THE SYSTEM OF ADMINISTRATIVE COURTS IN INDONESIA

by

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Dedicated to my husband Ibrahim Rahmad

and our children

Fatin Nabilah Ibrahim and

Muhammad Faris Ibrahim ...

To my parents Hashim Mokhtar and

Hawa Md. Dan ...

And to my parents-in-law

Rahmad Senudin and Alijah Dolah.

THE SYSTEM OF ADMINISTRATIVE COURTS IN INDONESIA

ABSTRACT

With the proliferation and explosion of administrative apparatus, the growth and expansion of the powers and functions of the administration in Indonesia, individuals' rights are increasingly being encroached upon by administrative actions or decisions. The reluctance of the Indonesian courts[1] to award damages to the citizens for unlawful acts of the administrators prior to 1991 has led to an urgent need to establish administrative courts which are independent of the government or executive. The need and enthusiasm to have administrative courts under the administration of the New Order[2] has finally led to the enactment of Law No. 5 of 1986 which came into force on 14th January 1991. With the enactment of this law, the Administrative Courts were established in Indonesia. The citizens of Indonesia are now allowed to sue the government before these courts. Only administrative decisions which come within the meaning of Law No. 5 of 1986 can be brought before the Administrative Courts. The Administrative Courts consist of the Administrative

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1 Ordinary law courts.

2 State administration in Indonesia after the revolution by the Indonesian Communist Party (PKI) which was also known as *Gerakan 30 September* at the end of 1965 is commonly known as the New Order.

Court as a court of first instance, Administrative Appeal Court as a court of appeal and the administrative jurisdiction climaxes at the Supreme Court.[3]

This dissertation seeks to study generally the mechanism of the System of Administrative Courts in Indonesia in providing legal protection and remedies to the citizens against unlawful acts of the government based on Law No. 5 of 1986. An attempt is also made to compare the operation of certain principles of administrative law of common law countries with the Indonesian administrative system under Law No. 5 of 1986.

Chapter I deals with some routine introductory matters encountered in the process of compiling and writing a dissertation. The dissertation proper starts with a discussion on the definitions of Administrative Law by writers from the Netherlands, Indonesia and common law countries in Chapter II. This is followed by Chapter III which deals with the reasons for the need and the historical development of Administrative Courts in Indonesia.

Chapter IV then discusses the principles and characteristics of the Administrative Courts in Indonesia based on Law No. 5 of 1986. The topics of discussion include the meaning of the term "administrative decision", the limitation period for filing an action, claims, the application of principles of due administration and the remedies within the administration in Indonesia.

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[3] The highest court of the land with administrative matters forming part of its overall jurisdiction.

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Chapter V on the other hand deals with admissible evidence and Chapter VI discusses in detail the procedures involved in settling administrative disputes. Chapter VII discusses the independence of the Administrative Court Judges in Indonesia.

This is followed by two more chapters on the remaining provisions of Law No. 5 of 1986 and the implementation problems of the system respectively.

As usual, this dissertation concludes with some comments and recommendations on the working of the Indonesian system.

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CONTENTS

LIST OF STATUTES

AUSTRALIA

Administrative Decisions (Judicial Review) Act 1977
Administrative Appeals Tribunal Act 1975

FRANCE

Law 6 January 1986
Law 31 January 1987

INDIA

Constitution

INDONESIA

Constitution 1945
District of Palembang Regulation No. 8/HUK/83
District of Palembang Regulation No. 30 of 1959
Level I District of South Palembang No. 29 of 1960
Government Regulation No. 10 of 1961
Government Regualtion No. 7 of 1991
Government Regulation No. 26 of 1991
Government Regulation No. 43 of 1991
Indisch Bugerlijk Wetboek
Indische Staasregeling
Law No. 19 of 1948
Law No. 5 of 1959
Law No. II/MPRS/1960
Law No. 19 of 1964
Law No. 14 of 1970
Law No. 5 of 1983
Law No. 6 of 1983
Law No. 12 of 1985
Law No. 14 of 1985
Law No. 5 of 1986
Law No. 10 of 1990

Law No. 5 of 1991
Law No. 9 of 1994
Minister of Land Regulation No. 10 of 1961
Minister of Agriculture and Land Circular dated 21.4.1962 No. Unda 1/2/8
Minister of Home Affairs Circular No. SK 19/DDA/1971
Minister of Finance Circular Republic of Indonesia No 1129/KMK.01/1991
PP no. 7 of 1991
Presidential Decree No. 52 of 1990
Presidential Decree No. 16 of 1992
Presidential Decree No. 41 of 1992
Reglement op de rechterlijke Organisatie
Supreme Court Circular No. 1 of 1991
Supreme Court Circular No. 2 of 1991
Supreme Court Circular No. 2 of 1992
Supreme Court Circular No. 1 of 1993
Supreme Court Circular 224/Td.TUN/X/1993
Staatlab 1915
Staatlab 1927
Temporary Constitution 1950

MALAYSIA

Courts of Judicature Act 1964
Public Authorities Protection Act 1948
Rules of the High Court 1980

NETHERLANDS

General Administrative Law Act

UNITED KINGDOM

Rules of the Supreme Court
Supreme Court Act 1981

LIST OF CASES

D.C. of P v Board of Control of Michigan Technology University
(1979) 2 ALD 711.

Direktur Utama PT. Inwangi & Co. v Gubenur KDH Tk. I Propinsi Sumatera Selatan and Ors
Decision of the Administrative Appeal Court of Medan No. 37/BDG-G/PL/PT/TUN/1992.

Dirik Moningka dkk v Corenus Leornadus Adrianus Wakking and Pieterus Rarung
Supreme Court No. 223K/Sip/1975.

Dr. Yunasri Siregar v Kepala Kantor Wilayah Departmen Perdagangan Proponsi Sumatera Utama
Supreme Court decision Reg. No. 1PK/TUN/1991.

Drake v Minister for Immigration and Ethnic Affairs
(1979) 2 A.L.D. 60.

Duncan v Cammell, Laird and Co.
[1942] AC 624.

Evans v Friedmann
(1981) 53 F.L.R. 229.

EVGF v Mackprang
[1975] E.C.R. 607.

Francis v Municipal Councillors of Kuala Lumpur
[1962] M.L.J. 407.

Fadzil bin Mohammed Noor v Universiti Teknologi Malaysia
[1981] 2 M.L.J. 196.

Goenawan Mohamad Pem-Red. Majalah Berita Minggu TEMPO v Information Minister of Republic Indonesia
Administrative Court decision. No. 094/1994/IJ/PTUN-JKT.

Gubernur Kepala Daerah Khusus Ibukota Jakarta and others v Suparman and others
Supreme Court Decision No. 34K/TUN/1992.

H.M.A. Alwi Rais and Ors v Walikotamadya Kepala Daerah Tingkat II Palembang
Supreme Court Decision No. 6K/TUN/1992 dated 31.8.1993.

Hamblin v Duffy
3 A.L.D. 153.

Hong Leong Equipment Sdn. Bhd v Liew Fook Chan
[1996] 1 MLJ 481.

HU v Panitia Penyelesaian Perselisihan Perburuhan Pusat
(P4P) Reg. No. 4K/TUN/1992.

J.P. Berthelesen v Director General Immigration Malaysia and Ors
[1987] 1 MLJ 134.

Jasopandojo Decision no. 838/Sip/1972.

Kasum Decision no. 66K/Sip/1952.

Kepala Dinas Perumahan Daerah IJ v Ny M and Ors
Supreme Court Decision No. 7K/TUN/1992.

Ketua Panitia Penyelesaian Perselisihan Perburuhan Pusat (P4P) and Others v Subarno Sukarman
Supreme Court Decision dated 21.3.1995 No. 09K/TUN/1994.

Ketua Pengarah Kastam v Ho Kwan Seng
[1977] 2 M.L.J. 152.

Ketua Pengarah Alam Sekitar & ANor v Kajing Tubek & 2 Ors.
[1997] 3 AMR 2521.

Laker Airways Ltd v Dept. of Trade
[1977] 2 All ER 182.

Lindawati v Bupati Kepala Daerah Tingkat II Gianyar
Supreme Court Decision 10K/TUN/1992 dated 15.10.1994.

Lonrho plc v Secretary of State for Trade and Industry
[1989] 2 All ER 609.

Majelis Pertimbangan Pajak and Another v PT. Standard Stamping
No. 32K/TUN/1993.

Mallappa Murigeppa Sajjan v Karnataka
AIR 1980 Kant. 53.

Mohammed bin Ismail v Tan Sri Haji Othman Saat
[1982] 2 MLJ 133.

Matawi v Bupati Kepala Daerah Tingkat II Gresik
Supreme Court Decision No. 48K/TUN/1992 dated 2.8.1994.

Mersing Omnibus Co. Sdn. Bhd. v Minister of Labour and Manpower and Anor
(1983) 2 MLJ 54.

Mohammed Raihan bin Ibrahim v Government of Malaysia
[1981] 2 MLJ 27.

Moss v Lamb
(1983) 49 A.L.R. 533.

Ng Hock Cheng v Pengarah Am Penjara & 2 Ors.
[1997] 4 AMR 4193.

Ny Dedeh Ratnanigsih v Kepala Kantor Pertanahan Kabupaten Bekasi
Administrative Court Bandung dated 11.10.1993 No. 25/G/PTUN-BDG/1993.

Ny. Ng and Others v Wakil Gubenur Bidang Pemerintahan and Others
Supreme Court Decision Reg. no. 17/TUN/1992.

Panitia Penyelesaian Perselisihan Perburuhan Pusat (P4P) v PT Santa Mas Delta Raya Construction
Supreme Court Decision Reg. No. 3K/K/TUN/1993.

Preston v IRC
[1985] 2 All ER 326.

R v London County Council, ex p. Corrie
[1918] 1 KB 68.

R v Intervention Board of Agriculture
case 181/84 [1985] E.C.R. 2889.

R v Secretary of State for the Home Department, exp. Brind
[1991] 1 AC 696.

R v Bransley M.B. ex.p. Hook
[1976] 1 WLR 1052.

Racz v Home Office
[1994] 1 All ER 97.

Re K(H) - an infant
[1967] 1 All ER 226.

Re S.B. and Director-General of Social Services
(1981) 3 A.L.N. 153; 3 A.L.N. 98.

Re Tan Boon Liat
[1977] 2 M.L.J. 108.

Ridge v Baldwin
(1964) AC 40.

Riordan v Conor
(1981) 53 F.L.R. 112.

Robinson v South Australia
[1931] AC 704.

Rohana Bte Ariffin v USM
[1989] 1 MLJ 487.

Rustan Br. Tohang v Gabenur Kepala Daerah Tingkat I Sumatera Utama Di Medan
No. 34/G/1991/PTUN-MDN.

Schmidt v Secretary of State for Home Affairs
[1969] 2 Ch. 149.

State of Punjab v Sodhi Sukhdev Singh
AIR 1961 SC 493.

Soeramin v Kepala Kantor Pertanahan Kabupaten Jember
Supreme Court Decision dated 16.1.1995 No. 102K/TUN/1993.

Sykt Bekerjasama-sama Serbaguna Sungai Gelugor v MPPP
[1996] 2 MLJ 697.

Sydney Municipal Council v Camphell
[1925] AC 338.

Tan Tek Seng & SPP & Anor [1996] 1 MLJ 261.

Tjoeng Nie Shao v Kepala Dinas Perumahan Daerah Khusus Ibukota Jakarta, Firina, Harco and P.T. Harco Indah
Reg: No. 21K/TUN/1992.

Tropiland Sdn Bhd v Majlis Perbandaran Seberang Perak
[1996] 4 M.L.J. 16.

Tuan Hew Tjoe Tjong and Anor v Government of Republic of Indonesia
Decision of Administrative Court Jakarta dated 3.7.1993 No. 07/G/PTUN-JKT/1991.

United Engineers (M) Bhd. v Lim Kit Siang
[1988] 2 MLJ 12.

Y v Kepala Kelurahan P dan Walikotamadya Kepala Daerah Tingkat
No. 04/G/1991/PTUN

LIST OF ABBREVIATIONS

A

A.C.	Law Reports, Appeal Cases
ALD	Administrative Law Decisions
All E.R.	All England Reports
All E.R. Rep.	All England Law Reports Reprint
A.L.R.	Australian Law Reports
ADJR	Administrative Decisions (Judicial Review) Act 1977
AAT	Administrative Appeals Tribunal Act 1975
A.I.R.	All Indian Reporter

C

Ch.	Chancery Law Reports
C.M.L.R.	Common Market Law Reports

E

E.C.R.	European Court Reports

F

F.L.R.	Federal Law Reports

K

K.B.	King's Bench Reports

M

MLJ	Malayan Law Journal
MPP	*Majlis Pertimbangan Pajak*

Q

Q.B.	Queen's Bench Reports

S

SIUPP	*Surat Ijin Usaha Penerbitan Pers.*
S.C.R.	Supreme Court Reports

W

W.L.R.	Weekly Law Reports

CHAPTER I

INTRODUCTION

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I. INTRODUCTION

Administrative law is said to be the oustanding legal development of the twentieth century. The growth of Administrative Law has been the direct result of the growth of administrative apparatus, functions and powers of the State. With the change of the political philosophy from *laissez faire* (minimum governmental control over private enterprise and maximum free enterprise and contractual freedom) to social welfare state, the government plays an active role to promote the socio-welfare of the people. Thus, the government in a modern democratic State is actively involved in the regulation of almost all aspects of the people's life.

With the growth and expansion of State powers, individuals' rights are increasingly being impinged by the actions or decisions of the administration. In the modern administrative age, it has become extremely important that the powers of the mighty administration are properly controlled so that they are exercised for public good. The function of Administrative Law is to balance the conflicting claims between the rights of the administration and the rights of the individuals.

The modern administrative process described above is also taking place in the Republic of Indonesia. Perhaps the pace of development is even more hectic and complicated because of the size and complexity of the country and its people. The Indonesian courts prior to 1991 were quite reluctant to intervene and to award damages to the citizens for an unlawful act of the administrator. It was thus realised that there was an urgent need to establish administrative courts which could function independently of the government or executive.

The idea of having Administrative Courts is not new but had existed since 1970. This is because article 10 of Law No. 14 of 1970[1] states that one of the branches of the judicature in Indonesia is the Administrative Courts. However, due to some problems, it was not established earlier. Realising the urgent need to control the vast powers of the administration, serious efforts were then made to work for the establishment of the Administrative Courts in Indonesia and finally in January 1991, these courts were set up.

II. OBJECTIVES OF THE RESEARCH

The objectives of this research are:-

1. To have a basic idea and understanding on the System of Administrative Courts in a neighbouring country that has a different legal system and how far this system helps to provide for the legal protection of the people.

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1 This law is still in operation today.

2. To make a comparative study on the application of the principles of administrative law under the Indonesian Administrative Courts system with the relevant corresponding principles applicable in the common countries of England, Malaysia, Singapore, India and Australia. In discussing the position in Australia, emphasis will be placed on some relevant provisions in the Administrative Appeals Tribunal Act 1975 (AAT) and Administrative Decisions (Judicial Review) Act 1977 (ADJR).

3. Primarily to analyse the provisions of Law No. 5 of 1986 that regulate the System of Administrative Courts in Indonesia. Other than Law No. 5 of 1986, certain provisions of the Indonesian Constitution of 1945 and the General Rules on Judiciary, i.e., Law No. 14 of 1970 and Law No. 14 of 1985 will also be discussed. This is because judicial power is conferred by the 1945 Constitution. Law No. 14 of 1970 explains the four components of judicial system in Indonesia while the procedures on the request for cassation[2] and the application for review of decisions by the administrative courts lower than the the Supreme Court are governed by Law No. 14 of 1985.

4. To make some case studies on the decisions made by the administrative courts in order to see how this system helps to control administrative action and provide legal protection for the citizens. Though, strictly speaking, there is no such thing as binding precedent in the Indonesian

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2 Cassation is the appellate jurisdiction of the Supreme Court beyond which cases cannot go any further. The Supreme Court is the apex court of the Indonesian judicial system.

Legal System, judicial decisions nevertheless possess some binding effect. This is because the decisions of the Supreme Courts are of persuasive authority and if a decision is sound it would be followed. For example, in determining the meaning of the term "unlawful action" in Indonesia, the definition expounded by the Supreme Court in Jasopanjojo's[3] case is used and applied until today.

III. METHODOLOGY

A. Library Research

This research is mainly done in the Law Library of the Faculty of Law, University of Malaya; Faculty of Law of University Airlangga, Surabaya, Indonesia and its Law Library. The research at the Faculty of Law, University of Malaya is to obtain general information on the System of Administrative Courts in Indonesia and the corresponding and/or comparative materials on the administrative law of the common law countries. However, due to the lack of more detailed, varied and the latest information on the Indonesian System of Administrative Courts in this country, a further research at the Faculty of Law, University of Airlangga was necessary. The Indonesian exposure helps to compile materials from textbooks, dictionaries, law and administrative law journals, statutes, reported cases and other appropriate sources.

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3 Decision no. 838/Sip/1972.

B. Interview

In order to have a better understanding on the System of Administrative Courts in Indonesia, interviews were conducted with one Administrative Court Judge in Surabaya and some lecturers from the Faculty of Law, University of Airlangga, Surabaya. In these interviews, the writer was given explanation, information and insight not only on the System of Administrative Courts in Indonesia but also a general idea of the Legal System in Indonesia. The Indonesian Legal System is influenced by the Dutch System and thus different from the common law system.

C. Problems and Difficulties

There were some problems and difficulties faced by the writer in carrying out this research. First, there are insufficient materials available locally regarding the System of Administrative Courts in Indonesia. In order to overcome this problem, the writer made two visits to the Faculty of Law, University of Airlangga, Surabaya, Indonesia. At this university, the writer received help from the students and staffs of the faculty, particularly, Professor Philipus M. Hadjon a well-known professor in this field. With his help, the writer was able to get the latest information, materials and reported cases on Administrative Law in Indonesia. Besides that, the writer was given the opportunity to attend a short course on Administrative Law in Indonesia for one and a half weeks and a one-day seminar on a specific topic on Law No. 5 of 1986 held at the University of Airlangga. As pointed out above, the interviews conducted also helped to gain more insight into the Indonesian system.

Secondly, the writer also faced problems in understanding the Indonesian legal terms and getting the most appropriate meaning in English. This is because most of the references are in the Indonesian language, the official language used in Indonesia. The writer tried to use general and Indonesian-English law dictionaries and consulted Professor Philipus to overcome her problems.

Thirdly, the writer too faced problem in getting reported cases on Administrative Disputes in Indonesia. This problem arose because the Indonesian Legal System is not based on the doctrine of binding precedent. Thus, case study is not popular in that country and so not all Indonesian administrative scholars refers to Indonesian Administrative Law cases when discussing this topic in their writings. However, the writer found a book written by Professor Philipus with other writers that does make references to administrative law cases. Unfortunately, the book only made references to a few reported cases. The writer towards the end of her research had to make further research in University Airlangga itself.

Fourthly, due to the Indonesian language used in the Indonesian Administrative Dispute cases, the writer at first faced difficulties in understanding the cases. However, the problem was overcome when the writer received assistance from the students, staff, lecturers from University of Airlangga and held discussions with Professor Philipus.

Though the writer faced much problems and challenges in the process of carrying out this research, with the encouragement given by her first supervisor, Professor Hari Chand, she continued the research till completion.

D. The used of translated version of Law No. 5 of 1986 as guideline.

Since this research focuses on the System of Administrative Courts in Indonesia, the main source of reference is the relevant statute applicable, i.e., Law No. 5 of 1986. The official version is in Indonesian language, but there is a translated version of this statute in English and the writer made use of it. However, if the terms used in the translated version is not appropriate, the writer used the correct English terms as advised by her first supervisor. For example, the term "State Administrative Decision" used in article 1:3 is not used by the writer, instead the term "Administrative Decision" is used. Another example is the word "Plaintiff" under article 1:6 is not appropriate, instead, the word should be "defendant". Inaccuracy of the translation is due to the unique Indonesian language used in Law No. 5 of 1986 and some infelicitous English terms used in the translation. According to Professor Philipus, that is the best translated text available.

IV. ARRANGEMENT OF CHAPTERS

This dissertation is composed of ten chapters. The chapters are carefully arranged in the hope that readers unfamiliar with the civil law system can follow them with ease. A brief description of the content of each of the

chapters has already been given in the Abstract. No useful purpose will be served by repeating them here.

V. TERMINOLOGY

The title of this research is "The System of Administrative Courts in Indonesia". The term "Administrative Courts" is used because, under Law No. 5 of 1986, the system includes the Administrative Court as court of first instance, Administrative Appeal Court as an appellate court and finally the Supreme Court[4] that has jurisdiction to hear a request for a cassation[5] and an application for a review of the decisions of the courts below. The term "Administrative Body or Official" refers to the administrator. In administrative disputes, the administrator is the "defendant". On the other hand the civil law body[6] or individual in an administrative dispute is the "claimant".

Since the Indonesian legal terms are in Indonesian and Dutch, the writer tries to translate them into English. However, in translating the terms, the Indonesian or the Dutch terms are maintained in brackets. This is to ensure that the original meaning of the terms is maintained and to avoid any misconception and mistakes.

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4 Highest court in Indonesia.

5 *Supra*, n. 2.

6 A body having legal entity.

CHAPTER II

INDONESIAN ADMINISTRATIVE LAW

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INDONESIAN ADMINISTRATIVE LAW

The Dutch occupation in Indonesia for more than a century, i.e., from 1816 to 1942, had a significant impact in that the Indonesian legal history and system have been influenced greatly by the Dutch system. Thus, in discussing the Indonesian administrative law, the views expressed by the Dutch writers have to be referred to. For instance, Kuntjoro Purborpranoto[1] and Philipus M. Hadjon in their writings had made references to the Dutch writers in discussing the nature and scope of Indonesian administrative law.

According to Kuntjoro, Van Vollenhoven[2] in defining the meaning of administrative law, made a distinction between constitutional and administrative law. His opinion was influenced by Oppenheim's[3] writing that defined constitutional law as law with an aim in which the State is in a static position; while administrative law is a study of a State in a dynamic situation. Based on this approach Van Vollenhoven defined constitutional law as law that create state apparatus and attributed powers to them, while administrative law as

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1 Indonesian Professor in Administrative Law.

2 Professor in Law from Netherlands.

3 Professor in Constitutional Law from Netherlands.

law regarding the use of state apparatus with powers attributed to them by the constitutional law.[4]

Van Vollenhoven explained in his writings that the belief that there is a principal distinction between constitutional and administrative law was made by a French scholar, J.M. Baron Gerando in 1819.[5] Baron was of the opinion that administrative law dealt with rules that administered the mutual relation between the government and the citizens. This view was subscribed to by Oppenheim and later by Van Vollenhoven.

Though the above writers have taken the stand to distinguish between constitutional and administrative law, there are writers who had taken the opposite view. For instance R. Kranenburg and J.H.A. Logemann[6] were of the opinion that the distinction between constitutional and administrative law is not important. Both of them considered administrative law as a specific law from the constitution.[7]

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4 The definition on administrative law seems to be defective because he failed to address the question of statutory powers.

5 Purbopranoto, Kuntjoro. Beberapa Catatan Hukum Tata Pemerintahan Dan Peradilan Administrasi Negara (Bandung: Penerbit Alumni, 1975), p. 16.

6 Professor in Constitutional law from Netherlands.

7 Hadjon, Philipus M., *et al.*, Pengantar Hukum Administrasi Indonesia (Yogyakarta: Gajah Mada University Press, 1994), p. 23.

J.H.A. Logemann in his study regarded constitutional law as law relating to State organisation *(organisatierecht van staat)* and administrative law as specific regulations that deal with the State organisation within that society.[8]

W.F. Prins[9] in his writings on the other hand does not define the meaning of administrative law but discusses the difficulties encountered in defining them. He acknowledges that constitutional and administrative law are within the scope of public law.[10]

E. Utrecht defines administrative law as norms with sanctions to guide administrators in their involvement in the socio-economic activities of the people, and rules that regulate the relationship between the government apparatus and an individual within the society.[11]

Apart from the Dutch writers, the Indonesian writers too do make an attempt to define and discuss the nature and scope of Indonesian administrative law, such as Prajudi Atmosudirdjo[12] and Philipus M. Hadjon.

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8 Purbopranoto, Kuntjoro. Perkembangan Hukum Administrasi Indonesia (Bandung: Angkasa Offset, 1981), p. 2.

9 Professor in Administrative Law.

10 Purbopranoto. Beberapa Catatan, p. 25.

11 *Ibid.*

12 Professor in Administrative Law in Indonesia.

Prajudi in his discussion on the meaning and scope of administrative law has taken the public administration approach. In his study, he defines administrative law as a law relating to State administration and law resulting from the creation of State administration.[13] Based on his analysis, Heteronomous Administrative Law *(Hukum Administrasi Negara Heteronom)* which is based on Constitutional law, Legal Decision of People's Representative Assembly[14] and Legislation *(Undang-undang)* is a law that regulates the organisation and State administrative functions. On other hand, Autonomous Administrative Law *(Hukum Administrasi Negara Otonom)* is the operational law created by the Administrator and State Administration.[15]

He proceeded further by saying that there is a combined meaning of administrative law, i.e., Administration from the State as an organisation and the special administration is an aim at achieving the public purpose.[16] Hence, in his conclusion, Prajudi said that Administration is the overall management or control mechanism of an organisation.[17]

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13 Atmosudirdjo, Prajudi. Hukum Administrasi Negara (Jakarta Timur: Penerbitan Ghalia Indonesia, 1981), p. 35.

14 According to the elucidation of the 1945 Constitution, the sovereignty of the people is with the People's Representative Assembly. The Assembly would fix the broad outlines of national policy for the legislative and executive spheres of government. Those directed at the legislature must be implemented by "statute", those at the executive by "Presidential Decision".

15 Atmosudirdjo, *loc.cit.*

16 *Ibid.*

17 *Ibid.*

Philipus M. Hadjon, however, had taken a different view in discussing the meaning and scope of Indonesian administrative law. In his study, he had taken the approach based on the *Sociale rechtsstaat* concept *(konsep negara hukum kemasyarakatan)*[18] where the administrative law is defined as a legal instrument *(instrument yuridis)* to regulate the social life of the citizens and as a means to participate in the government administration.[19] The above definition shows that the important elements in administrative law are *sturen* (the legal power of the government), participation and legal protection.[20] This view forms the normative dimension of Indonesian administrative law which include:

Firstly, the legal power of the government (the law to govern) which covers matters pertaining to competency of the government, sources of the competency of the government and the norms of the government's conduct.

Secondly, the law of the government organisation and legal instrument which consists of structure, legal instrument used by government to govern and administrative law enforcement.

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18 This is a legal concept which deals with the involvement of the governed in the welfare of the State based on rule of law.

19 Hadjon, Philipus M. "Beberapa Cacatan Tentang Hukum Administrasi", Lecture in the "Temu ilmiah Pengajar Hukum Tata Negara dan Hukum Administrasi Se-Jawa Timur". Surabaya, 10th July 1993, p. 1.

20 *Id., p. 3.*

Finally, it provides legal protection of the governed against government's action.

Even though there is no conclusive definition nor is there a common theme on the nature and scope of Indonesian administrative law, the above study helps in the understanding of the Indonesian administrative law.

In England, however, towards the end of the 19th century, A.V. Dicey had denied the existence of administrative law in that country by arguing that that law was a peculiar feature of the continental system unknown to common law.[21] However, today administrative law is a rather developed system of law in the common law jurisdictions.

Wade, a prominent British writer, makes two observations on administrative law. Firstly, he says administrative law is the law relating to the control of governmental power.[22] In his view, governmental power in question is the powers of all public authorities, other than the Parliament, and these powers must be subject to legal limitations. According to him, this is important in order to protect the citizen against the abuse of power. Secondly, he observes that administrative law may be said to be the body of general principles which

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21 *C.f.*, Mahendra, P. Singh. German Administrative Law in Common Law Perspective (Berlin Heidelberg, New York, Tokyo: Psringer-Verlag, 1985), p. 1.

22 Wade, H.W.R. Administrative Law (Oxford: Oxford Clarendon Press, 1994), p. 4.

govern the exercise of powers and duties by public authorities.[23] He is also of the view that on the whole administrative law may be treated as a branch of constitutional law because it flows directly from the constitutional principles of the rule of law, the sovereignty of Parliament, and the independence of the judiciary and it tries to balance the power between the state and the citizen.[24]

Foulkes too is of the opinion that administrative law is concerned with public authorities.[25] He further says that since administrative law is regarding public administration which operates through institutions, therefore the study of administrative law must include some knowledge of the complex institutions that comprise public administration.[26] According to him the existence of these institutions is to exercise powers and duties, hence administrative law is concerned with the proper and improper use of these powers, how to distinguish between proper and improper use of these powers, how to prevent the improper use of power and lastly how to remedy the improper use of power.[27]

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23 *Id.*, p. 5.

24 *Id.*, p. 6.

25 Foulkes, David. Administrative Law (London, Dublin, Edinburgh: Butterworths, 1995), p. 2.

26 *Ibid.*

27 *Ibid.*

Writers from other common law countries too have tried to formulate the nature and scope of administrative law. For instance, M.P. Jain, an Indian writer, has tried to suggest what he thinks is a more satisfactory formulation regarding the scope, content and ambit of administrative law. In his formulation, administrative law deals with structure, powers and functions of organs of administration; the limits of their powers; the methods and procedures followed by them in exercising their powers and functions; the methods by which their powers are controlled; the legal remedies available to a person against them when his rights are infringed by their operation.[28]

Even though different writers have different approaches in defining and discussing the nature and scope of administrative law, most of them came to the same conclusion that administrative law is a law that regulates the relationship between the government and the citizens. Writers like Philipus, Wade, Foulkes and Jain have all emphasised on a common theme, that is, administrative law is a law that provides a legal control of governmental powers in order to protect the citizens against governmental action.

This important theme has influenced Indonesia to develop a system of proper administrative law particularly the establishment of the Indonesian Administrative Courts. The need for Administrative Courts and their establishment in Indonesia will be dealt with in the ensuing Chapter III.

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28 Jain, M.P. Administrative Law of Malaysia and Singapore (Singapore, Kuala Lumpur: Malayan Law Journal Pte. Ltd., 1997), p. 14.

CHAPTER III

ESTABLISHMENT OF ADMINISTRATIVE COURTS

CHAPTER III

ESTABLISHMENT OF ADMINISTRATIVE COURTS

I. NEED FOR ADMINISTRATIVE COURTS

The aim of State administration in Indonesia is to protect the citizens and to establish a prosperous, peaceful and orderly society.[1] To achieve it, the elucidation of the 1945 Constitution further provides:-

a) Indonesia is a State based on law *(reschtstaat)* and not mainly on power *(machtstaat)*.

b) The government administration is based on constitutional system *(sistem konstitutional)*, not absolutism *(kekuasaan tidak terbatas)*.

The above provisions require that the administrator in Indonesia must act in accordance with the law and that the government is founded upon constitutionalism. The citizens are protected against unlawful administrative action.

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1 Preamble of 1945 Constitution, para IV. It must be noted that this Constitution is still in force today.

It may not be out of place here to probe into what amounts to an "unlawful administrative act". When is an administrator said to be acting unlawfully in his or her administrative action? The Supreme Court has defined the meaning of the term "unlawful administrative act" in Kasum[2] and Jasopandojo.[3]

In Kasum's case, the Supreme Court pronounced that an act is said to be regarded as unlawful if there are elements of arbitrariness or lack of public interest. According to the facts of this case, between the period of 15.11.1944 until 23.3.1946, Kasum operated an optical business at Jln Braga Nr. 21. However, due to *force majeur*, he was forced to close his business at that premise. Later, Kasum applied to the Resident of Bandung to resume his former business at the same premise, which was then occupied by the family of Yap Po Tjan. Negotiations were held between Kasum and the occupier of the premise, but there was no solution on the matter. The Resident of Bandung in allowing the application said that, the optical business involved elements of State and public interests. The matter was then brought before the Supreme Court for a cassation. The main issue in this case was whether the administrator had acted unlawfully in making the decision. In this case, the Supreme Court held that:

> "the administrator has not acted unlawfully because there was enough elements of public interest in their actions or in other words, it is not clear that the administrator had acted arbitrarily, i.e., it would be a great loss to Indonesia in the light of the

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2 Decision no. 66K/Sip/1952.

3 Decision no. 838/Sip/1972.

> circumstances during that period if Kasum is not given a proper place to operate his optical business, and during that particular period, there is no other suitable place except the premise under dispute."[4]

This case was not followed after the decision of the Supreme Court in Josopandojo's case.

The Supreme Court in Josopandojo's case on the other hand formulated two criteria to determine the lawfulness of administrative action. In this case the respondent was ordered by the Governor to return the house he rented to the owner, second appellant. This was because the respondent was alleged to have contravened the use of the house from a residential to that of a commercial premise. The respondent contended that in making such a decision the governor had exceeded its power because the governor's decision had resulted in the termination of the tenure agreement between the respondent and the second appellant. The respondent also alleged that the decision of the Office of the Housing Affairs *(Urusan Perumahan DKI)* was against the elementary principles of judicature *(azas-azas elementr dari peradilan)* because the decision was based only on letters sent by the respondent without giving him any hearing. Furthermore, looking at the matter from the social point of view, the respondent and his 12 other members of the family were more in need of the house than the second appellant. This was due to the fact that the second appellant had other houses and he was still single. The respondent also claimed that the sealing of

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4 Decision no. 66K/Sip/1952.

the house had affected the harmonious living of his family and as a result, he suffered damages. The respondent brought an action against the decision of the governor in the civil court on the ground that the governor had acted contrary to the law and, hence, his decision was invalid. The court of first instance held that the first appellant[5] had acted contrary to the law and thus the decision was invalidated. The appellants made an appeal to the High Court and the decision of the lower court was upheld. The appellants then brought the matter to the Supreme Court for a cassation on the ground that the High Court was confused in making the decision when it presumed that the house under dispute was not governed by the housing licence *(surat idzin perumahan)*. The Supreme Court was of the opinion that the *judex-facto*[6] had erred in law in applying the relevant law, i.e., article 10 of the Government Regulation No. 49 of 1963.[7] To determine the lawfulness of administrative action, the court formulated the following criteria:[8]

1. the act should be determined by the Act and formal provisions. In this case, the relevant law was dealing with

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5 Governor of the Province of Jakarta Raya and The Office of the Housing Affairs (Pemerintahan Daerah Khusus Ibukota Jakarta Raya qq Gubenur Kepala Daerah Khusus Ibukota Jakarta Raya qq Kepala Dinas Perumahan DK1 Jakarta, berdudukan di Jakarta).

6 Judge that hears the facts of the dispute, i.e. Judge of the court of first instance and also Judge of the Court of Appeal (but it exclude judge at cassation level).

7 Article 10 provides for matter pertaining to the used of premise by tenants.

8 Dec. no. 838/Sip/1972.

housing and the court held that the first appellant had not acted contrary to the law; and

2. the lawfulness of administrative acts should be determined by proper manner acknowledged by the society.[9] In this case the court too held that the first appellant had not acted against this criteria.

The court also pointed out that the evaluation on the social-economical factors between the owner and the tenant was within the competency of the administrative body because this was a discretionary power *(perbuatan kebijaksanaan Penguasa)*. Thus the court stressed that it was not competent to decide on matters where the administrators had exercised their discretionary power properly except in cases of arbitrariness and/or *detournement de pouvoir*.[10] Since the respondent had failed to prove an unlawful act by the first appellant, the Supreme Court reversed the decision of the High Court.

The decision of the Supreme Court in Josopandojo's case has become a permanent judicial decision and is followed like a precedent. This was evident in a seminar held in Lembang from 30th May to 1st June 1977. In this seminar, those criteria formulated by the Supreme Court in Jasopandojo were

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9 In the present context, this concept is equivalent to the principle of carefulness under the principles of due administration.

10 Abuse of power.

fully endorsed and taken as the basic criteria concerning the lawfulness of an administrative act in Indonesia.[11]

Under the common law system, the administration may also be guided by a policy in the exercise of its discretion provided that there is no fettering discretion. Fettering discretion occurs when the authority applies a general policy to all cases coming before it for decision without looking into the merits of each individual case. A decision is invalid whenever fettering discretion occurs.[12]

In Australia, the exercise of power based on policy is governed by statute - section 5(2)(f) and section 6(2)(f) of the Administrative Decisions (Judicial Review) Act 1977 (ADJR). Though both sections have similar provisions, section 5 is a provision regarding application for review of administrative decisions, while section 6 is an application for review of conduct relating to the making of decisions.

Hence to ensure that the citizens in Indonesia are duly protected against an unlawful administrative act, there is a need for a control mechanism particularly judicial review of administrative actions. According to Prajudi, to impose judicial control on the administrator, there is a need to develop a

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11 A good decision is nevertheless followed in subsequent cases although there is no such thing as binding precedent in Indonesia.

12 R v London County Council exp. Corrie [1918] 1 K.B. 68, British Oxygen Co. Ltd. v Board of Trade [1970] 3 All ER 165, Coalmines Provident Fund Comm. v J.P. Lalla AIR 1976 S.C. 676.

systematic administrative law and courts and the courts to be established must be independent of the executive.

Prior to 1991, there were only two ways of legal protection for the citizens against administrative actions - remedies within the administration and civil action on unlawful action *(perbuatan melanggar hukum, onrechtmatige daad)*. There are two types of remedies within the administration - objection and administrative appeal. The former is a process whereby if a citizen is not satisfied with an administrative decision, he makes an objection to the same administrative body which has made the decision. The later is a process whereby if a citizen feels that his interests are unlawfully affected by an administrative decision, he may appeal to a higher or superior administrative body. In deciding the appeal, the appellate body may use its own procedure.

Though the above remedies are aimed at protecting the interest of the citizens, they lack the element of control from another independent body. This has led to the establishment of Administrative Courts in Indonesia.

With respect to the second mode of protection, the basis of civil jurisdiction on unlawful action is article 1365 of *Indisch Bugerlijk Wetboek (IBW)*[13] which provides:-

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13 This is a civil code that was introduced in the Netherlands Indies in 1848 after its Dutch model of 1838, parts of which are still in force in Indonesia today.

> "Every unlawful act causing damage to another person obliges the one by whose fault the damage was caused to pay compensation."

The Sewer Hole's case *(Kasus lubang riol)*[14] is an example of civil jurisdiction on unlawful action. In this case, on 4th October 1985, after a heavy rainfall, the public roads in Medan were covered with rainwater. The plaintiff and his grandchild while passing a road on his motorcycle, fell and sank into a hole that had been hidden under a stagnant pool of rain water. The hole had been dug by the Public Works Department of Medan three months earlier for the purpose of channelling the water from the main road to the drain beside it. It was not covered and no warning of any kind was placed around it. The plaintiff was hurt and his motorcycle was damaged. He claimed compensation for the said injury and damage at the civil court *(Pengadilan Tinggi)* in Medan. In August 1986, the court of first instance allowed the plaintiff's claim when the authorities were proven to be negligent. The authorities appealed to the Medan High Court but failed. The case was then brought to the Supreme Court, which, in November 1990 confirmed the earlier courts' decisions.

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14 Otto, Jan Michiel, "Conflicts between citizen and state in Indonesia: the development of administrative jurisdiction", Working Paper no. 1, Van Vollehoven Institute for Law and Administration in Non-Western Countries, 1992, at pp. 5-6. This working paper is a revised version of a paper presented to the 8th European Colloquim on Indonesia and Malay Studies (ECIMS) at Kunglár, Sweden, 15-20 June 1991.

Although there is a legal basis for the claim in respect of the unlawful act, it is hardly allowed in practised.[15] The situation has not changed even after the independence. Jan Michiel Otto in his working paper said:-

> "... according to our data, this court has in practice hardly ever obliged a state organ to pay compensation to a citizen.
>
> Also, very rarely the Supreme Court has declared administrative decisions invalid, as the Dutch has done as from 1948. Only in a few of the published cases, it actually exercised such powers, notably in two cases when an administrative decision of the directorate-general Agraria was nullified by the civil judge (Mahkamah Agung 1477/K/Sip/1973 and 34/PK/Ptd/1984, Ali 1978: 60, 84). But in many other cases the civil judge refrained from correcting the decisions of the administration."[16]

The attitude of the common law courts, however, differs from that of the Indonesian courts. The common law courts are ready to declare the action or decision of an administrator as *ultra vires* and may even hold him or her liable

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15 Decisions of the High Court of Batavia in cases dated 25th May 1939, 13 July 1939 and 30th November 1939.

16 Otto, *op.cit.*, p. 8.

in tort in an appropriate case. Damages could also be awarded. An anthology of cases could be cited to illustrate the propositions alluded to.[17]

Hence, due to the reluctance of the Indonesian courts to award compensation to Indonesian citizens for an unlawful act by the administrators and to ensure that the citizens receive a proper protection against unlawful administrative action, there is an urgent need to establish a system of administrative courts which are independent of the executive. Sarono S.H., in his speech on a topic "Problems on Administrative Courts" *(Permasalahan Peradilan Administrasi Negara)* before the *Musyawarah Nasional Persatuan Sarjana Hukum Indonesia*, an Indonesian law association, in early August 1972, pointed out and emphasised that there is an urgent need for an administrative court to avoid the development of law of the jungle in the administrative process and an administrative court is a control mechanism against errant administrators.[18]

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17 Cooper v Wandsworth Board of Works [1861] All ER Rep. 1554, a case dealing with failure to give a right of hearing prior to deprivation of property; Racz v Home Office [1994] 1 All ER 97, a case on ill-treatment of a remand prisoner by the prison officers; Mohammed Raihan bin Ibrahim [1981] 2 MLJ 27, a case on negligent supervision of students by a teacher in the course of a practical gardening class resulting in one student negligently causing injury to another; Tropiland Sdn Bhd v Majlis Perbandaran Seberang Perai [1996] 4 MLJ 16, a case on the imposition of fresh conditions unlawfully after the completion of a housing project resulting in the award of damages to the developer. However, the Court of Appeal disagreed, [1996] 3 AMR 41:3101. The Indian Supreme Court has gone further and held in a number of cases that damages could be awarded in cases of breach of a fundamental liberty without having to prove the commission of a tort.

18 Marbun, S.F. Peradilan Administrasi Negara (Yogyakarta: Perpustakaan Fakultas Hukum Universitas Islam Indonesia, 1983), p. 24.

II. HISTORICAL DEVELOPMENT

Prior to 1948, there was no effort made to establish a special court to settle administrative disputes in spite of the existence of provisions relating to the settling of disputes by administrative bodies. During the Dutch occupation, article 34(1) of *Indische Staasregeling* (Indonesian State provisions) and article 2 of *Reglement op de rechterlijke Organisatie* (Regulations on Judicial Organisation) provided that civil disputes were to be judged by an ordinary Judge while administrative disputes by the administrative body concerned.[19]

Later, a special court to resolve tax matters was created. This court, known as *Raad van beroep voor belastingzaken,* was set up under *Staatslab* 1915 (State Gazette). The organisation of the court was further improved through *Staatsblad* 1927 No. 29[20] and it is still in existence after the independence and is known as *Majelis Pertimbangan Pajak* (Tax Tribunal). However, theoretically there is a problem with its existence after the enforcement of Law No. 9/1994.[21] According to elucidation of article 48 of Law No. 5 of 1986, *Majlis Pertimbangan Pajak* is a body dealing with administrative appeals. Thus if a person is not satisfied with the decision of the *Majlis Pertimbangan Pajak,* appeal could be made to the Administrative Appeal Court.[22]

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19 These provisions are no longer in force today.

20 Marbun, *op.cit.*, 2.

21 Law regarding *Majlis Pertimbangan Pajak* (Tax Tribunal). This tribunal still exists today.

22 Art. 51(3).

Nevertheless, article 27(2) of Law No. 9/1994 provides that *Majlis Pertimbangan Pajak* is a special court for tax matters and its decision is final. Thus if a citizen is not satisfied with the decision of the *Majlis Pertimbangan Pajak* appeal could not be made to the Administrative Appeal Court. This problem will be further discussed in Chapter IX.

After Indonesia had proclaimed its independence, efforts were made to form an administrative court to settle administrative disputes. The first attempt was made in 1948 when Law No. 19 of 1948 was enacted. According to article 66 of this law, administrative disputes were to be resolved by the High Court and Supreme Court[23] unless the law provided otherwise. Unfortunately, the law was not enforced.

When the Temporary Constitution 1950[24] was enacted, article 108 provided that administrative disputes were to be adjudicated by the civil court or by a special administrative court. Article 142 further provided that all regulations and law in force on 17th August 1950 shall continue to be in force with no changes inclusive of the provision on administrative law in the 1945 Constitution. Then by Temporary People's Consultative Assembly Decree *(Ketetapan Majelis Permusyaratan Rakyat Sementara (MPRS))*, Law No. II/MPRS/1960, a body known as *Lembaga Pembinaan Hukum Nasional (LPHN)* was set up to make a draft law on administrative jurisdiction.

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23 This refers to ordinary courts not the administrative courts.

24 No longer in force today.

By 1964, Law No. 19 of 1964, a law on Judicial jurisdiction, was enforced. Based on article 7(1) of this law, the Judicial jurisdiction included Administrative jurisdiction. A working committee was then set up to work on the draft law of administrative jurisdiction *(Panitia Kerja Penyusun Rang Undang-undang Peradilan Tata Usaha Negara)*. Though the draft was ratified by the LPHN on 10th January 1966, it was not submitted to the *Dewan Perwakilan Rakyat Gotong Royong* (Parliament) due to a change of State administration from the Old Order to the New Order.[25]

Under the New Order, the enthusiasm to have an administrative court system still persisted. The first attempt was made by replacing Law No. 19 of 1964 with Law No. 14 of 1970. Under the new law, article 10(1) provided that the Judicial Jurisdiction included Administrative jurisdiction. Later, by *MPRS* decree, Tap No. IV/MPR/1978, Broad Guidelines of State Policy, was executed. This decree expressed the need for an administrative court. By 31st May 1982 effort was made to submit the draft law on administrative jurisdiction to *Dewan Perwakilan Rakyat (DPR),* the national parliament, but the draft was rejected. It was returned to the executive to make some changes. Further attempt was made to submit the improved draft to the *DPR* on 16th April 1986.

By 20th December 1986 the draft was finally approved and was promulgated on 29 December 1986. In 1990 the necessary legislative steps were taken to establish the hierarchy of the Administrative Courts in Indonesia. On

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25 Marbun, *op.cit.*, p. 5.

October 30th 1990, an executive law (Law No. 10 of 1990) was promulgated, establishing three administrative courts: the Administrative Appeal Court in Jakarta, Medan and Ujung Pandang.[26] Five other administrative courts of the first instance were also established in Medan, Palembang, Jakarta, Surabaya and Ujung Pandang by presidential decree, Kepress No. 52. The law on administrative jurisdiction, Law No. 5 of 1986 *(Undang-undang Republik Indonesia Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara)*[27] was finally enacted and by Governmental Regulation, *PP No. 7* of 1991, the law came into force on January 1991.

From then onwards, the people of Indonesia are allowed to sue the government before a special system of administrative courts known as *Pengadilan Tata Usaha Negara (PTUN)*. Today, the Indonesian administrative courts operate under the main legislation of Law No. 5 of 1986. It is important to note that the majority of the cases brought before the Indonesian Administrative Courts are disputes involving land matters.

On the matter of appointment of the Indonesian Administrative Courts Judges, it must be said that a judge must be a law graduate or a graduate in another discipline with expertise in the field of Administration.[28] The judges

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26 Otto, *op.cit.*, p. 1.

27 This is the main statute which will form the focal point of analysis in this dissertation.

28 Art. 14 and Art. 15.

are civil servants. Hence, the Indonesian system is not an exact replica of the civil law model.

Amongst the common law jurisdictions, Australia has a general appellate tribunal to review decisions of Commonwealth officers and authorities which is known as Administrative Appeals Tribunal. The Administrative Appeals Tribunal was established under section 5 of the Administrative Appeals Tribunal Act 1975 and commenced operation on 1st July 1976. Generally, its function is to hear full appeals (that is, review on law and on merits) against the decisions of Commonwealth Ministers, officers and authorities.[29]

Whatever the differences between the civil law and common law systems are, the theme of both systems is to ensure that the citizens are properly protected against unlawful administrative actions or *ultra vires* acts of the administrators.

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[29] Hotop, S.D. Principles of Australian Administrative Law (Sydney: The Law Co. Ltd., 1985), p. 379.

CHAPTER IV

INDONESIAN ADMINISTRATIVE COURTS (I)

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INDONESIAN ADMINISTRATIVE COURTS (I)

I. PRINCIPLES AND CHARACTERISTICS

To apprehend the operation of the Indonesian Administrative Courts (*Peradilan Tata Usaha Usaha Negara)*, it is important to know its underlying characteristics and principles. Philipus tried to categorise them into four divisions:[1]

1. Firstly, there is a legal presumption that administrative decision is presumed to be valid until nullified by the court *(praduga rechtmatig)*. This principle is provided in article 67(1) of Law No. 5 of 1986[2] which states that a complaint against a decision of the administrator shall not result in the postponement of the execution of the decision except in a case of extreme urgency where the interest of the claimant would be seriously injured if the decision impugned is implemented.[3]

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1 Hadjon, Philipus M., *et al.*, Pengantar Hukum Administrasi Indonesia (Yogyakarta: Gajah Mada University Press, 1994), p. 23.

2 As pointed out earlier, Law No. 5 of 1986 is the principal legislation governing the operation of the Indonesian Administrative Courts. This statute shall constitute the main focus of analysis of this dissertation.

3 Though under the common law system the same presumption applies, the court has the discretion whether to allow the execution of the administrative decision to proceed or to stay it.

2. Secondly, by virtue of article 107 the Administrative Courts judges have the freedom to determine the burden of proof in a proceeding. However, this is subject to article 100.[4]

3. Thirdly, the administrative courts judges played an active role in the administrative proceeding. This principle is aimed at safeguarding the interest of both parties in the disputes and to seek the real truth *(kebenaran matriil)* in a particular matter in dispute. This principle is based on articles 58, 63(1),(2), 80 and 85. According to article 58, a judge has the power to require both parties of a dispute to appear before the court even though they are legally represented. However article 63(1) provides that the judge must hold a preparatory hearing before adjudicating on the main disputes so as to clarify or ascertain the complaint made. It is further provided that in the preparatory hearing, the Judge must advise the complainant to clarify his complaints within 30 days and the Judge can obtain an explanation from the relevant administrative body. To ensure the smooth running of a proceeding, article 80 provides that the Judge has the power to guide the parties in the conflict pertaining to legal avenues and the evidence that could be used. Article 85 further empowers the Presiding Judge in the proceeding to order the production of evidence or an explanation to be given by the administrator in the dispute. In the event of any suspicion of forged evidence, the Presiding Judge may send the relevant evidence to an authorised expert for

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4 Art. 100 provides a list of admissible evidence in a proceeding. It will be dealt with later.

determination. While awaiting for the result, the administrative proceeding may be adjourned.[5]

4. Fourthly, the decision of the Administrative Courts binds not only the parties involved but also the citizens. This is referred to as the principle of "*erga omes*". This is due to the fact that administrative disputes are public law disputes.[6] This principle would be dealt with again in chapter VI while discussing the application of article 83 regarding intervention by third party in administrative disputes under Law No. 5 of 1986. Besides the above characteristics and principles, it is also important to note that the Administrative Courts can only preside over matters which are categorised as administrative decisions. According to article 47, an Administrative Court has the duty and competence to examine, to decide and to settle administrative disputes. An administrative dispute, according to article 1:4, is a dispute arising in the arena of State Administration between a person or civil law body and a State Administrative Body or Official at the central or regional level as a result of an Administrative Decision *(keputusan tata usaha* negara) under the operative law, and it includes public service disputes. An administrative decision, according to

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5 The situation in the common law system is different. Since the administrative disputes in the common law countries are adjudicated by the ordinary courts, the proceedings are bound by the rules of evidence and subjected to the adversary system. The position in Australia, however, is slightly different. Section 33(1)(c) of the Administrative Appeals Tribunal of 1975 (AAT) provides that the Tribunal is not bound by the common law rules of evidence and may determine the use of evidence as it thinks appropriate.

6 Hadjon, *et al., op.cit.*, p. 23.

article 1:3, is a written decision issued by an administrative authority based on administrative law which is concrete, individual and final in nature and it entails legal consequences for a private person or legal body.

II. AIMS

The aims of the Administrative Courts are clearly stated in the preamble of Law No. 5 of 1986 besides parliamentary documents.[7] According to the preamble, the nation of the Republic of Indonesia as a nation of law *(negara hukum, rechstaat)* based on the *Pancasila*[8] and the 1945 Constitution aims at achieving:

(a) Establishing a prosperous, secure, peaceful and orderly society, with equality of citizens before the government apparatus and the citizens.

(b) Creating a public service that is efficient, effective, clean and authoritative fulfilling its tasks according to law and subservient to society.

(c) Emphasising that although development is intended to maintain order and security for all, in practice conflicts may arise between the administration and citizens that might thwart development.

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7 *Keterangan pemerintah dihadapan sidang paripurna DPT* - explanation by the government before the conference of the parliament, the Information of the government in the plenary session of the parliament, and the reports of the special committee of the parliament that is appointed to examine a certain draft law.

8 The five basic principles of the Republic of Indonesia: the belief in God Almighty, humanity that is just and civilised, the unity of Indonesia, democracy guided by the wisdom of representative deliberation, and social justice for all Indonesians.

(d) Solving such conflicts by having administrative courts which are intended to secure and maintain justice, righteousness, order and legal certainty so that it can provide protection for the citizens.

Based on the concept of *negara hukum*, Judge Indroharto stressed that the establishment of the administrative courts finally completes and fulfils the establishment of a *negara hukum* (a state based on law) with an independent judiciary that can decide whether administrative decisions are right or not.[9]

In connection with the concept of clean and authoritative civil service, the Minister of State Apparatus Efficiency, Sarwono Kusumaatdja, while addressing a group of new appointees who would serve as administrative judges, said that the administrative courts would be an instrument of legal control to create a clean and authoritative civil service.[10]

Although equality and protection for the citizens are given an important place in Law No. 5 of 1986, the first paragraph of its elucidation shows that the principles of the *Pancasila* and development also prevail. According to this paragraph, the rule of law is designed to establish a prosperous, secure, peaceful and orderly society, but efforts to guarantee individual rights must be

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9 Otto, Jan Michiel, "Conflicts between citizen and state in Indonesia: the development of administrative jurisdiction," Working Paper no. 1, Van Vollenhoven Institute for Law and Administration in Non-Western Countries, 1992, p. 20-21. This working paper is revised version of a paper presented to 8th European Colloquium on Indonesia and Malay Studies (ECIMS) at Kungláv, Sweden, 15-20 June 1991.

10 *Ibid.*

brought in line with the philosophy of life and the identity of the State and the people based on the *Pancasila*.

Paragraph 7 further provides that the Administrative Courts provide protection to people in search of justice who feel that they are aggrieved by an administrative decision. However, paragraph 8 states that:

> "But we must be aware that besides individual rights, society also has certain rights based on the joint interest of the people who live therein. Those interests may collide. To guarantee the proper handling of those interests, the channel of law is the best way and in accordance with our State philosophy *Pancasila*. So the basic rights and duties of the citizens must be placed in harmony, balance, and adjustment between individual interests and the interests of the society. Thus, the goal of the administrative courts is actually not only to give protection to individual rights but at the same time also to protect the rights of the society".[11]

III. ORGANISATION

A. Structure

To understand the organisation of the administrative courts in Indonesia, which is known as *Peradilan Tata Usaha Negara* (PTUN), it is important to know the provisions of article 24 of 1945 Constitution and article 10 of Law No. 14 of 1970 on the General Rules on the Judiciary.

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[11] *Id.*, p. 21. It is to be noted it is the function of Administrative Law to draw a fine balance between the competing claims of the administration and individual rights in any modern democratic society.

According to article 24:

(1) The judicial power shall be exercised by the Supreme Court and other courts of law in accordance with statute.

(2) The structure and powers of those courts of law shall be regulated by statute.

Article 10 of Law No. 14 of 1970 then provides:

(1) The four spheres of the judicature are the General Courts, Religious Courts, Military Courts and Administrative Courts.

(2) The Supreme Court is the Highest National Court.

(3) Cassation can be brought to the Supreme Court against decision made by other courts.

(4) The highest judicial control is exercised by the Supreme court in accordance with the law.

The above provisions show that the administrative courts are one of the four divisions of the Indonesian courts of judicature and are separated from the general or ordinary courts which hear generally civil and criminal matters but are subject to the control of the Supreme Court which is the Highest National Court.

The creation and operation of the Administrative Courts are governed separately by Law No. 5 of 1986. According to article 8 thereof, the Administrative Courts consists of:

(1) The Administrative Court[12] as court of first instance *(Pengadilan Tata Usaha Negara)*.

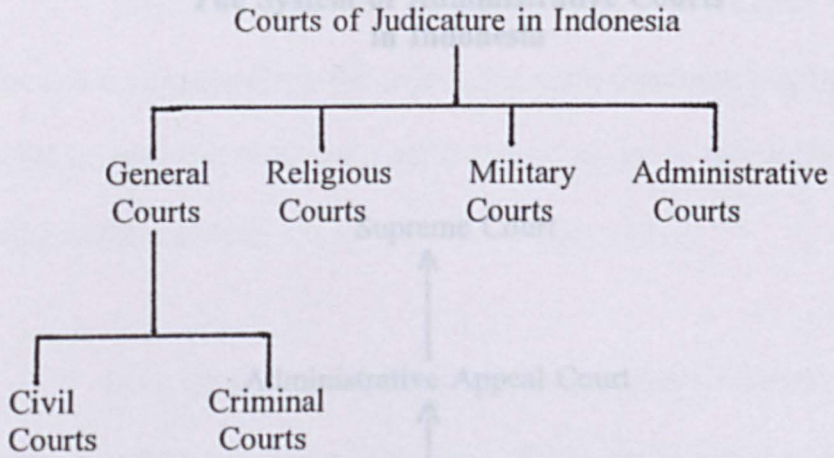
(2) Administrative Appeal Court as the court of appeal *(Pengadilan Tinggi Tata Usaha Negara)*.

Further, under article 10(2) of Law No. 14 of 1970 and article 5(2) of Law No. 5 of 1986, the administrative jurisdiction culminates at the Supreme Court.

The three diagrams below show the Indonesian Judicial System. The system of administrative courts is shown in Diagram 3.

DIAGRAM 1

The Four Spheres of Judicature in Indonesia Based on Article 10 of Law No. 14 of 1970



12 It must be noted that there is only one Administrative Court. This court may sit at different venues. The same is also true of the Administrative Appeal Court.

DIAGRAM 2

Judicial Control by the Supreme Court in Indonesia

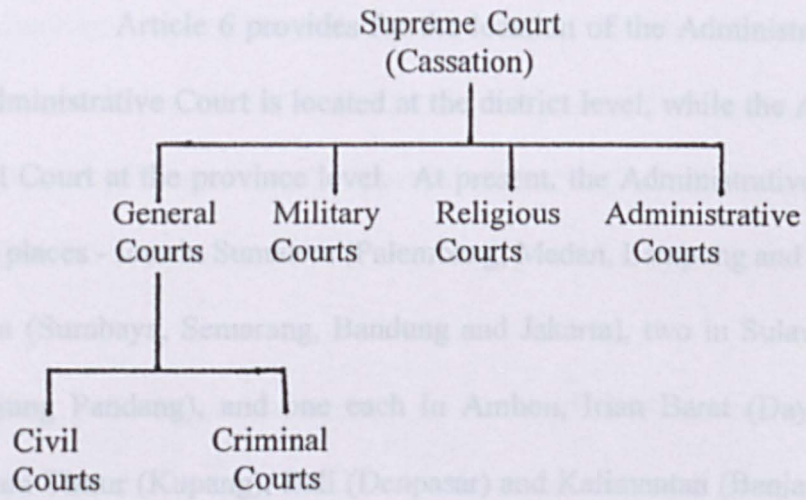
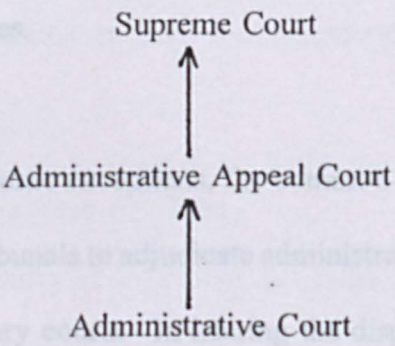


DIAGRAM 3

The System of Administrative Courts in Indonesia



It must be reiterated that Law No. 5 of 1986 shall constitute the main focus of study of this dissertation.

B. Management

Article 6 provides for the location of the Administrative Courts - the Administrative Court is located at the district level, while the Administrative Appeal Court at the province level. At present, the Administrative Court sits at fifteen places - four in Sumatera (Palembang, Medan, Lampung and Padang), four in Jawa (Surabaya, Semarang, Bandung and Jakarta), two in Sulawesi (Menado and Ujung Pandang), and one each in Ambon, Irian Barat (Dayapura), Nusa Tenggara Timur (Kupang), Bali (Denpasar) and Kalimantan (Banjarmasin). The Administrative Appeal Court sits at four locations - one each at Jakarta, Medan, Ujung Pandang and Surabaya.

Article 11 states that an Administrative Court shall consist of a president and a vice-president, the judges, the clerk *(panitera)* and the secretary. Article 68(1) provides that the standard quorum in an administrative court proceeding is three judges.

Save for some exceptions, the common law countries do not have general administrative tribunals to adjudicate administrative disputes. The disputes are referred to the ordinary courts. In hearing the disputes, the civil court rules of procedure apply. For example, in Malaysia, the High Court has the jurisdiction to hear applications for judicial review by any person aggrieved by an

administrative decision or action.[13] Here the High Court hears the applications by way of judicial review and thus the proceedings shall be heard and disposed of before a single Judge[14] and the Rules of the High Court 1980 apply. For instance, under the Rules of the High Court 1980, non-prerogative remedies, such as declaration[15] are obtainable. In Australia, the same is governed by the relevant provisions of the Administrative Appeals Tribunal Act 1975.[16] The decision of the Tribunal may be appealed against to the Federal Court of Australia on a question of law.[17]

In Indonesia, under Law No. 5 of 1986, the management of the courts is regulated by articles 27 to 46. In accordance with these provisions, the management of Administrative Courts is divided into two parts: the management of cases led by the clerk *(panitera)* and the general management of cases led by the secretary *(sekretaris)*.

The clerk is supported by his staff. They are the deputy clerk, the junior clerks and several relief clerks.[18] The clerks shall support the judges in their judicial work with guidance from the Supreme Court.[19]

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13 Order 53 of Rules of the High Court 1980; Sec. 25(2) and its schedule of the Courts of Judicature Act 1964.

14 Sec. 18 of the Courts of Judicature Act 1964.

15 Order 15, rule 16.

16 The relevant sections are ss. 20 and 21.

17 *Id.*, sec. 44(1).

18 Art. 27.

19 Arts. 38, 39.

On the other hand, the judicial secretary is entrusted with the duty of taking care of the general management of the Administrative Courts.[20] In executing his duty, the secretary and his deputy are supervised by the Department of Justice.[21] In each court, there shall be a secretariat headed by a secretary who is assisted by the deputy secretary.[22] The clerk also serves concurrently as the Court Secretary.[23]

IV. REMEDIES WITHIN THE ADMINISTRATION (DOMESTIC REMEDIES)

Article 48 provides that if an administrative body or official is given the authority to resolve administrative disputes through administrative review processes, then such disputes must be settled through those existing channels of administrative review. Only after these existing avenues of administrative review have been exhausted, may the matter be brought before the Administrative Appeal Court in its capacity as the court of first instance if the affected person is not satisfied with the decision of the administrative body.[24] This is the first avenue of resolution of administrative disputes. It must be resorted to whenever the law provides for remedies within the administration.

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20 Art. 46(1).

21 Art. 46(2).

22 Art. 40.

23 Art. 41.

24 Art. 51(3).

On the other hand, if no administrative process is provided for handling administrative disputes within the administration, a complaint of such a dispute may be made to the Administrative Court. This constitutes the second avenue of resolution of administrative disputes. It is to be resorted to whenever the law does not provide for any remedy within the administration.

The above discussion is best express in the diagramatic presentation (Diagram 1 and 2):

Two avenues of administrative dispute resolution
in Indonesia

DIAGRAM 1

Dispute involving domestic remedies

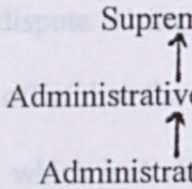
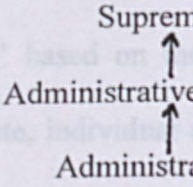


DIAGRAM 2

Disputes involving no domestic remedies



Any administrative dispute must go to either of these avenues.

Under the Supreme court circular (*surat Edaran Mahkamah Agung*) No. 2 of 1991 dated 19th July 1991, if an administrative review process only provides for an objection, the complaint can be made directly to the Administrative Court *(Pengadilan Tata Usaha Negara)*.

Under the common law system, a claimant may seek the remedies available within the administration on condition that they are express provisions therefor or go directly to the civil court that has jurisdiction to hear administrative disputes by way of judicial review.

V. ABSOLUTE COMPETENCY OF THE ADMINISTRATIVE COURTS

Article 47 provides that the duty of the Administrative Court is to hear, decide and resolve all administrative disputes. "Administrative dispute" is defined in article 1:4 as a dispute arising between a person or civil law body and an administrative body or official at the central and regional level as a result of an administrative decision, which includes a public service dispute, based on the law in force.

Article 1:3 further defines "administrative decision" as a written determination made by an administrative body or official pursuant to an 'administrative law action' based on the law in force *(peraturan perundang-undangan)* which is concrete, individual and final in nature and which has legal consequences on a person or civil law body.

In the light of the above provisions, administrative disptues arising from the making of administrative decisions may be brought before an Administrative Court for adjudication. Based on article 1:3, the elements of administrative decision are as follows:

(a) Written determination

"Written determination" is intended to be an evidence for legal certainty and to ensure that the administrative authority does not deny the decision so made. Article 1:3 must also be read together with article 3 which provides that a failure to make a decision is regarded as an administrative decision in the sense of rejection.

Reference must also be made to Article 3(2) and (3). Article 3(2) provides that if a time period is prescribed in the regulation for the administrative body or official to make a decision, and if there is a failure to make the decision within the time period specified, the administrative body or official shall be considered to have refused to deliver the decision. But according to article 3(3) if the relevant law does not specify a time period for making a decision, then after the elapse of four months after receiving the request, the relevant administrative body or official shall be deemed to have made a decision refusing the request.

Further, article 3 also has to be read with article 97(9)(b) which states that if a complaint is upheld by the court, the court may specify the obligation to make an administrative decision. Hence, the primary aim of article

3 is to ensure that the administrative body would not delay the making of a decision.

(b) By administrative body

"By administrative body" refers to the function not the structure of the administrative body or official.

(c) Administrative law action

"Administrative law action" refers to the exercise of power based on administrative law.

(d) Concrete, individual

"Concrete, individual" means that the decision is not of an abstract or general in nature.

(e) Final, have legal consequences

Final means the decision has legal consequences against an individual or civil law body and it is reviewable by the Administrative Court. The word final should not be confused with finality clause under the common law system.

Article 1:3 is subject to article 2 which excludes certain administrative decisions from the jurisdiction of the Administrative Courts. The exclusions referred to in article 2 are as follows:

(a) Administrative decisions which represent a civil law activity.

(b) Administrative decisions which represent regulation of a general nature.

(c) Administrative decisions which still require approval.

(d) Administrative decisions which are handed down on the basis of judicial decision by a judicial body on the basis of the provisions of the law in force. For example, if someone has no birth certificate to show that he is of the age of majority, he can go to the local authority for a declaration. However, the declaration is valid only for six months. Thus it is necessary for him to have a birth certificate. This could be done by going to the ordinary court and praying for a decision. After the court's decision, he may go to the administrator to have the birth certificate issued. In this case, the issue of the birth certificate by the administrator is based on the court decision.

(e) Administrative decisions which are handed down on the basis of the provisions of the Criminal Law Code or the Criminal Law Procedure Code or other laws of a criminal nature.

(f) Administrative decisions regarding the administration of the Armed Forces of the Republic of Indonesia.

(g) A decision of the Indonesia Electoral Commission both central and regional regarding the results of a general election.

It is important to note that article 1:3, article 2 and article 3 have to be read together with article 1:6. According to article 1:6 the defendant[25] is the administrative body or official who hands down a decision on the basis of discretion vested or delegated to him which is being challenged by the person or civil law body.

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25 The translated version of Law No. 5 of 1986 uses the wrong word of 'plaintiff'.

There are cases in which the elements of administrative decision have been discussed. In a case decided by the Administrative Court in Medan,[26] the claimant received letters from the first and second defendants. The letter from the first defendant, who was the municipality *(walikotamadya)*, contained information that all transactions regarding land title on Project P, Medan must go through the PT.P (as second defendant). In this case, one of the issues was whether the letter from the first defendant was an administrative decision of an individual character. In this case, the court discussed the status of PT.P and came to the conclusion that it was an administrative body due to the fact that it received a delegated power from the municipality. Regarding the nature of the letter from the first defendant, the Judge was of the opinion that:

> "the letter (letter from the first defendant to the claimant) appears to be just a letter from the first defendant to the claimant which is an Administrative Decision that fulfiled the condition in Article 1, item 3 of Law No. 5 of 1986."[27]

Antonius Soedjadi, in his annotation of this case, was of the opinion that the letters from the second defendant have legal consequences but not the letter from the first defendant. He said that the latter is just a reminder or guideline to the claimant on how to execute the decision made by the second defendant. Thus the letter from the first defendant to the claimant was not an

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26 Case no. 04/G/1991 PTUN Mdn.

27 Gema Peratun, Year 1 No. 1 Februry 1993, p. 28.

administrative decision according to article 1:3 of Law No. 5 of 1986.[28] The legal discussion by Antonius Soerdjadi is now known as *Peraturan Kebijakan (beleidsregels)*, i.e., policy rule, which means it is a decision containing guideline on a rule regarding the use of authority. Since this rule is not a statutory provision, it is not an administrative decision.[29]

In a Supreme Court decision,[30] the second defendant acting under the instruction of the first defendant, the Governor, had issued an instruction under No. 35 of 1991 dated 22 January 1991. Based on this instruction, the third defendant was then ordered to execute an eviction order on a piece of land belonging to the claimants and surrendered the land to H.S. Among the issue raised was whether the instruction by the Governor was final in nature. It was held that even though the Governor's instruction was a written determination which is concrete and individual, it was not final and had no legal effect against the claimant. This was because the instruction was given to the third defendant, not to the claimants, to execute the eviction order. Based on this instruction, the third defendant then ordered the claimants to evict the land under dispute. Thus, according to the court, the eviction order made by the third defendant was an administrative decision or a written determination within the meaning of article 1:3 of Law No. 5 of 1986. Hence, the eviction order by the third defendant should be the object of the dispute.

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28 *Id.*, p. 29.

29 Hadjon, *et al. op.cit.*, p. 321.

30 Reg. No. 17/K/1992.

In common law countries that do not have a general or special administrative tribunal, it is not necessary to define the term "administrative decision" in order to determine the jurisdiction of the court. This is because in those countries, an administrative dispute is categorised as a civil matter and it falls under the jurisdiction of the civil court governed by the rules of civil procedure. The jurisdiction of the court is invoked in most cases by way of judicial review.

The Australian position is different because administrative disputes are adjudicated by tribunals created by statutes. Both the Administrative Appeals Tribunal Act 1975 and Administrative Decision (Judicial Review Act) specifically deal with the term 'decision'.[31] The term 'decision' has also been defined in case law.[32]

Thus, in countries with statutory provisions on administrative jurisdiction regardless of whether it is Indonesia or common law countries, it is important to determine whether the decision made by the administrator comes within the scope defined by the relevant Act otherwise the question of competency

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31 Sec. 25 and s. 3(3),(1) AAT; sec. 5 ADJR.

32 Decisions based on AAT: Collector of Customs (New South Wales) v Brian Lawlow Automative Pty (Federal Court) (1979) 2 ALD 1, D.C. of P v Board of Control of Michigan Technological University (1979) 2 ALD 711; decisions based on ADJR: Moss v Lamb (1983) 49 A.L.R. 533, Evans v Friedman (1981) 53 F.L.R. 229, Riordan v Conor (1981) 53 F.L.R. 112, Hamblin v Duffy 3 A.L.D. 153, Australian National University v Burns 64 F.L.R. 166, Chittick v Auckland (1984) 53 A.L.R. 143.

or jurisdiction of the Court or Tribunal will not arise. Besides the general definitions, there are also exemption provisions excluding certain administrative disputes from the jurisdiction or competency of the administrative court or Tribunal.

VI. TIME LIMIT TO MAKE A COMPLAINT

According to article 55 of Law No. 5 of 1986, a claimant may file a complaint against an administrative decision within 90 days from the moment he receives the decision of the administrative body or official; while a third party with interest may make a complaint within 90 days from the moment the decision is announced. Though there is provision regarding the limitation period to file a complaint, there exists problems especially regarding the determination of the announcement procedure. This led to the issue of the Supreme Court Circular No. 2 of 1991 which provides that:

> "As against those in which the decision of the Administrative Body or official are not directed to them but (the individual) feels that there is damage done to his interest as the result of the decision, the 90 days period starts from the moment the party knew of the Administrative decision."[33]

Even though the above pronouncement tried to clarify the announcement procedure, yet there is still uncertainty on the determination of when the party exactly knew of the administrative decision and as a consequence

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33 Part V rule 3.

thereof an administrative decision could be challenged many years after it had been made.[34] Thus in applying the provision on limitation period, there is a need to have an authoritative pronouncement on the doubtful point raised. In fact, there can also be some doubt in interpreting the 90 day period in the first situation dealt with in article 55.

Under the common law system since an administrative dispute is a civil matter, the limitation period is governed by either the general provision in the Limitation Act or a specific statutory provision. For example, in Malaysia, in the case of an order for *certiorari* against an administrative decision, the application for leave must be made within 6 weeks after the date of the proceedings or time prescribed by any written law and any delay must be accounted for to the satisfaction of the court.[35] The Public Authorities Protection Act 1948 (Malaysia) provides for a limitation period of 36 months to commence an action in court against a public authority for an act committed or done by its officer in the exercise of his public duties.[36]

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34 Hadjon *et al.*, *op.cit.*, p. 324.

35 Order 53, rule 1A, of Rules of High Court 1980. It is to be noted that this Malaysian provision is based on its English counterpart, i.e., Order 53 of the Rules of the Supreme Court. However the English provision has undergone some amendments recently.

36 Sec. 2(a).

VII. *LOCUS STANDI (Hak gugat, ius standi)*

Article 53(1) provides that an individual or private legal body may challenge an administrative decision if he feels that his interests have been injured thereby. Thus, in Indonesia, a complaint could be made by an individual or private legal body if there is a causal relationship between the administrative decision and the injury to interest.[37] But what that causal relationship is has not been clearly defined yet.

It can be observed that the Indonesian provision lays down a restrictive test for locus standi for challenging an administrative decision, i.e., the "aggrieved person" test. The question of public interest litigation does not arise there because of the restrictive test provided.

It may be of interest to take a quick glance at the position in other common law jurisdictions. In Malaysia, Order 53 and Order 15 rule 16 of the Rules of the High Court 1980 is silent on the matter of *locus standi.* The Malaysian Courts have adopted the restrictive "aggrieved person" test.[38] In India the Indian Supreme Court has opted for the liberal test of *locus standi* and allows public interest litigation to thrive in India.[39] In England, the Parliament has

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37 Hadjon, *et al., op.cit.,* p. 324.

38 United Engineerings (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12; Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & 2 Ors [1997] 3 AMR 2521.

39 Mallappa Murigeppa Sajjan v Karnataka A.I.R.1980 Kant. 53. The source of jurisdiction is Art 32 and 226 of the Indian Constitution.

enacted for the liberal test of "sufficient interest" in the matter to which the application relates".[40]

VIII. CLAIM

A. Claim *(Petitum)*

The main claim[41] provided for in article 53(1) is to declare that the administrative decision is void or invalid. In addition, claims for compensation and rehabilitation (reinstatement) may also be made. The empowering provision for compensation is article 120(3), the amount of which would be determined by the Government Regulation. Based on the Government Regulation No. 43 of 1991, the minimum amount of compensation to be awarded by the administrative judge is Rp.250,000, while the maximum amount is Rp. 5,000,000.[42] Thus, though there is a right to compensation in a case of unlawful administrative action, the amount that may be awarded is very meagre indeed.

On the other hand, the claim for rehabilitation (reinstatement) applies only to the public service dispute.[43] However, if the rehabilitation order

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40 Order 53, Rules of the Supreme Court has been amended to reflect the change and the Supreme Court Act 1981 gave legislative effect thereto.

41 Under the common law the term used is remedies available in an application for judicial review.

42 It is to be noted that RM100 was equivalent to Rp98,000 as in June 1997.

43 Art. 97(11). Art. 121 provides for the execution of the rehabilitation order.

is unable to be implemented the claimant would be given compensation for the amount between Rp. 100,000 to Rp. 2,000,000.

These are the only remedies available in the Administrative Courts of Indonesia in contra distinction with what a common lawyer would aspect under the elaborate remedies under the common law such as declaration, *mandamus, certorari*, injunction and others.

However, since Law No. 5 of 1986 has only come into force in January 1991, the Indonesians are still in the early stage of implementing the provisions thereof. Proper application of the law and the implications thereof will not come about quickly.

In Ny. NG and Ors v Wakil Gubenur Bidang Pemerintahan and Ors,[44] the second defendant acting under the instruction of the first defendant, had issued an instruction under No. 35 of 1991 dated 22 January 1991. Based on this instruction, the third defendant was then ordered to execute an eviction order on a piece of land which belonged to the claimants and surrendered the land to HS. The claimants brought an action against the defendants alleging that the decision made by second defendant was contrary to article 53(2)(a) because the defendants did not have the authority to solve a civil dispute between the claimants and HS except in the ordinary civil court. The claims as made by the claimants, *inter alia*, were as follows:

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44 Supreme Court Decision Reg. no. 17/TUN/1992.

(1) A stay of execution against a removal order *(pembongkaran)* until a definite decision has been made by the Administrative Court *(adanya suatu putusan yang mempunyai kekuatan hukum yang pasti)*.

(2) To declare that the first and the second defendants had acted contrary to the law *(onrechmatmatige overheids daad)*.

(3) To declare that the Governor's instruction was legally invalid and thus void *(tidak sah dan oleh kerana itu batal demi hukum)*.

The Administrative Court upheld the claims made by the claimants. The defendants appealed to the Administrative Appeal Court and the Administrative Appeal Court upheld the decision of the lower court, i.e., the defendants had acted contrary to the law and misused the power they had, and ordered a stay of the removal order until a final decision was made by the court. The defendants then brought the matter to the Supreme Court for cassation. The application for cassation was accepted and the Supreme Court held that the Governor's instruction was not an administrative decision within the meaning of article 1:3 of Law No. 5 of 1986. This was because even though the Governor's instruction was a written determination which was concrete and individual but it was not final in nature that had legal consequences. This was because the instruction given to the claimants was only a reminder to execute an eviction order on the said land. Thus, the Governor's instruction No. 35 of 1991 dated 22.1.1991 was not an administrative decision to be an object of a dispute before the Administrative Court.

There are comments on the claims in the above case.[45] One of the comments is that the Supreme Court failed to include matter regarding the application for stay of execution in its decision. It was argued that the Supreme Court should have held that when a claim in an administrative dispute was rejected by the court, automatically the application for a stay of execution of an administrative order should also fail.

In another case, Y v Kepala Kelurahan P dan Walikotamadya Kepala Daerah Tingkat II M,[46] the claimant received a letter from the first defendant stating that all transactions regarding certification on a piece of land, P, must go through channels determined by the second defendant, failing which, the title of the land would not be given to the claimant. In this case the second defendant determined that the transactions must go through PT.P. The claimant challenged the decision of the defendants by seeking, *inter alia*, the following reliefs:

(1) to nullify the letters from the defendants;

(2) to declare that the decision could be executed immediately; and

(3) to declare that the claimant could deal with the transactions directly with the first and the second defendants.

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45 Hadjon, *et al.*, *op. cit.*, p. 325.

46 No. 04/G/1991/PTUN.

The court upheld part of the claims. The court too invalidated part of the decision of the first defendant not to give title of the said land to the claimant by deleting the words "not to give the claimant title of the said land".

There are comments too with regards to the above case, on the question of claims.[47] Regarding the second prayer, it was said that the claim is against article 115 which provides that only a court decision which has received the force of law can be enforced. Based on this provision Hadjon said that there is no immediate execution procedure under Law No. 5 of 1986. Regarding the third one, it was said to be unnecessary because once the administrative decision is nullified, the decision was invalid.

B. Grounds of claim base on Article 53

Since the aim of the Indonesian Administrative Courts is to provide legal protection for the citizens, the main function of the courts is to determine the lawfulness *(keabsahan)* of the decision made by the administrator. Article 53(2) provides for three grounds to test or measure the lawfulness of the administrative decision: They are:

1. The administrative decision under challenge conflicts with the existing legislation. According to the elucidation, there are three meanings to the phrase "conflicts with the existing legislation":

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47 Hadjon, *et al.*, *op.cit.*, p. 326.

(1) It conflicts with the provisions of a legislation which is procedural. For example, before a decision on the termination of service is made an officer needs to be given an opportunity to defend himself.[48]

(2) It conflicts with the provisions of a legislation which is material or substantial. For example, the administrator at the appeal stage within the administration had wrongly decided that the complaint made by the complainant was accepted or rejected.[49]

(3) It has been made by a body or public authority without authority. For example, the requisite regulation showed that other administrative body has the authority to make the decision.

2. The administrative body or official in making the decision under dispute has used their authority for a purpose other than what is permitted. This is commonly known as *"penyalahgunaan wewenang".*[50]

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[48] Procedural fairness, is a familiar feature of the common law system. Its observance is required in all cases where the administration is taking an action or making a decision in persuance of the exercise of a discretionary power which has the tendency to affect a person's rights or interests adversely. Cooper v Wandsworth Board of Works (1863) 14 C.B.N.S. 180; 143 E.R. 414, Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 M.L.J. 152 and Tan Tek Seng & SPP & Anor [1996] 1 MLJ 261.

[49] At common law, this is substantive ultra vires. The violation comes about when an express or implied substantive limit imposed by a statutory provision is exceeded. Francis v Municipal Councillors of Kuala Lumpur [1962] M.L.J. 407, Re Tan Boon Liat [1977] 2 M.L.J. 108; Fadzil bin Mohammed Noor v Universiti Teknologi Malaysia [1981] 2 M.L.J. 196, Laker Airways Ltd v Dept. Of Trade [1977] 2 All ER 182.

[50] The French categorise it as "*detournement de pouvoir*". This is similar to a situation where a discretionary power is exercised by an administrative authority under the common law system for an improper purpose. The classic case law illustration on this point is the landmark case of Sydney Municipal Council v Campbell [1925] AC 338.

3. After taking into account all the interests affected by the decision, it should not have come to such a conclusion or administrator should not have failed to make such a decision. According to the elucidation, this ground is normally known as the prohibition against an arbitrary act *(sewenang-wenang, willekeur)*. It must be pointed out that this concept is difficult to determine.[51]

There are a few cases to illustrate the application of article 53(2). In Soeramin v Kepala Kantor Pertahanan Kabupaten Jember,[52] the claimant applied to the defendant for the certification of a piece of land, which belonged to his late father, to his name. However, the defendant had refused the application but allowed the certification on the land use dated 15.4.1992 under the name of the Municipality of Jember even though prior to 1956 and until the case was heard, the land was owned and under the control of the claimant. The claimant claimed that he knew of the certification only on 11.9.1992 and the certification had affected his interests. The certification of the land was said to be unlawful within the meaning of article 53(2)(a) and (c) of Law No. 5 of 1986, in which, the claimant alleged that there was an arbitrary act by the defendant *(sewenang-wenang)* which was contrary to a legislation. The main issue in this case was whether the certification of the land to the name of the Municipality of Jember was an arbitrary act within the meaning of article 53(2)(a) and (c). The Administrative Court of Surabaya held, among others, the certification of the land

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51 Hadjon, *et al., op.cit.*, p. 327. At common law, this ground of review refers to unreasonableness.

52 Supreme Court decision dated 16.1.1995 No. 102K/TUN/1993.

to the name of the Municipal of Jember was contrary to Article 53(2)(a) and its elucidation, i.e., contrary to the provisions in the legislation which is procedural/formal. Thus, the certification was held to be invalid. However the defendant made an appeal to the Administrative Appeal Court and the court reversed the decision of the Administrative Court. The claimant then applied for a cassation to the Supreme Court against the decision of the Administrative Appeal Court. The Supreme Court reversed the decision of the Administrative Appeal Court and agreed with the decision of the Administrative Court with an additional direction, i.e., the defendant was ordered to revoke the certification of the said land.

In Kepala Dinas Perumahan Daerah IJ v Ny. M and others,[53] it was held that a person may use article 53(2) to challenge a decision of an administrative body if the administrative body has acted contrary to the law in force or has acted in excess of its power. In this case, there was a dispute regarding the title of a premise and the claimants had brought the matter before the ordinary court (jurisdiction on land title lies with the ordinary court) for final decision. While the case was still pending before the ordinary court, the defendant had made an eviction order against the claimants to vacate the said premise. The claimants requested the defendant to postphone the execution of the eviction order pending a final decision by the ordinary court on the question of title on the said premise. However the defendant rejected the claimants' request. The Supreme Court held that the defendant had acted contrary to the law and had

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53 Supreme Court decision Reg. No. 7K/TUN/1992.

acted in excess of its power. It therefore declared that the eviction order was null and void.

4. Due Administration

Besides the above grounds as stated in article 53(2), the recent development in the case law shows that the court has also accepted principles based on the "general principles of due administration" *(asas-asas Umum Pemerintahan yang Baik - AUPB).* According to Paulus Effendie Lotulung:

> "However, the new development in the jurisprudence of the Supreme Court has accepted other reason for bringing a lawsuit by giving an argumentation that the issuance of the administrative decision is in contradiction or violating the so called "the general principles of good administration", which constitutes an unwritten administrative law and must be respected and followed by the administrative body since in practice it has been considered as having the character of universal and natural justice."[54]

In the Netherlands, the principles of due administration before the enactment of the General Administrative Law Act[55] consisted of:[56]

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54 Lotulung, Paulus Effendie, "Judicial Review in Indonesia", Paper presented in the International Symposium on Comparative Studies On Judicial Review in East and South-East Asia held in Leiden, Netherlands, September 1995.

55 The first two stages of the General Administrative Law Act of the Netherlands have come into effect on 1.1.1994.

56 Buuren, P.J.J. van, "Principles of Due Administration", Lecture in the "Penataran on Administrative Law", Law Faculty, Airlangga University, January 05-12, 1996.

(1) Principle of careful preparation

Under this principle, the administrator is required to examine the case of the parties concerned and consider the relevant considerations needed in making a decision. This principle can be found in section 3:2 of the General Administrative Law Act[57] which provides:

> "When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed."

Here, the administrator is under the duty to give an opportunity to the interested party to give his view or opinion. Thus the administrator must give the interested party a right to be heard.[58]

(2) Principle of due motivation.

Under this principle, the administrator in making decisions, should be motivated in a satisfactory manner to ensure that the facts and considerations can sustain the decisions. This principle requires the administrators to give reasons for their decisions. This principle is manifested in sections 4:16-4:20 of the General Administrative Law Act. According to section 4:1:

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57 Note that this is a Dutch statute.

58 This is similar to the principle of *audi alteram partem,* and it also includes relevant and irrelevant considerations under the common law system.

"1. The reasons shall be stated when the decision is published.

2. If possible, the statutory regulation on which the decision is based shall be stated at the same time.

3. If, in the interest of speed, the reasons cannot be stated when the decision is published, the administrative authority shall give notice of them as soon as possible thereafter."

Further provisions relating to reasoned decisions in the Act are to be found in:

Section 4:18:

"1. The reasons need not be stated if it is reasonable to assume that they are not required.

2. If, however, an interested party requests within a reasonable period to be informed of the reasons he shall be notified of them as quickly as possible."

Section 4:19:

"To explain the reasons of a decision or part of a decision, it is sufficient to refer to an opinion prepared in this connection if the opinion itself contains the reasons and notice of the opinion has been or will be given to the interested party."

Section 4:20 provides:

"If the administrative authority makes a decision which departs from the opinion prepared for this purpose pursuant to a statutory regulation, this fact and the grounds for it shall be stated in the reasons of the decision."

The aforesaid provisions represent a comprehensive and detailed procedural protection of the right to "reasoned decisions".[59]

(3) Principle of equal treatment

Here the administrator is required to give similar treatment for similar cases in making an administrative decision. In Indonesia, the principle of equal treatment is based on article 27 of the 1945 Constitution.[60]

(4) Principle of legal certainty and good faith

This principle requires that every authority must be reliable, i.e. if they have made a decision on a matter, they should not change the decision in future. This is because legitimate expectations should be honoured. Legitimate expectation arises if the administrator makes promises or make policy rules. By

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[59] By way of comparison, it may be noted that generally the common law does not impose duty to give reasons in administrative decisions. But recently, there are signs that the courts are developing, under the doctrine of fairness, a duty to give reasons. Lonrho plc v Secretary of State for Trade and Industry [1989] 2 All ER 609, Rohana Bte Ariffin v USM [1989] 1 MLJ 487. In Malaysia, it has been held recently in Hong Leong Equipment Sdn. Bhd. v Liew Fook Chan [1996] 1 MLJ 481 that reasons for a decision must be given as part of procedural fairness where a fundamental liberty guaranteed by the Federal Constitution is adversely affected by a decision taken by a public decision maker. In Australia however, section 43 of the AAT Act provides that the Tribunal has the duty to give reasons. If the Tribunal failed to give reasons in writing for its decision, a party to the proceeding may, within 28 days after the day on which a copy of the decision of the Tribunal is served on that party, request the Tribunal to furnish to the party a statement in writing the reasons of the Tribunal for its decision and the Tribunal shall, within 28 days after receiving the request, furnish to that party such a statement.

[60] Article 27(1) provides without any exception, all citizens shall have equal position in Law and Government and shall be obliged to uphold that Law and Government.

virtue of such promises or policy rules, the citizens legitimately expect such rights be given to them. Legitimate expectations has been well established under the European Administrative Law. This principle actually derives from the German law. According to this principle, Community[61] measures must not (in the absence of an overriding matter of public interest) violate the legitimate expectations of those concerned.[62] It is the foundation of a rule of interpretation as well as a ground for annulment of a Community measure; most often, however, it is used as the basis for an action for damages for non-contractual liability.[63] An expectation is not legitimate unless it is reasonable. Reasonable is measured or based on whether a prudent man would have had the expectation and to determine this, all circumstances must be taken into account.

In Commission v Council (first Staff Salaries case)[64] the Commission[65] took an action against the Council regarding increment of staffs'

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61 The 'Community' as a single entity consists of three Communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).

62 Hartley, T.C. The Foundations of European Community Law (Oxford: Claredon Press, 1988), p. 142.

63 Tort. *Ibid*.

64 Case 81/72, [1973] E.C.R. 575.

65 According to the Treaties: the European Community (EEC), the European Atomic Energy Community (Euratom, the European Coal and Steel Community (ECSC)), Merger Treaty and the Convention on Certain Institutions Common to the European Communities, the Community has four institutions - the Commission, the Council, the European Parliament and the Court of Justice.

pay. In determining the increase, several factors need to be taken into account. In the past, there was serious friction on how the factors should be weighed; eventually a formula was reached to settle the matter and it was applicable for three years. When another increase in salary took place, the Council laid down a new scale. The new scale was challenged as breach of the previous formula. It was held that the decision on the formula was binding in view of the relation between the Council and staff, the staff had a reasonable expectation that the Council would abide by the formula. Therefore, the new scales were invalid. However, if a person concerned was not acting in the normal course of business but was trying to take advantage of the weakness in the Community system to make a speculative profit, his expectation can not be regarded as legitimate.

In EVGF v Mackprang,[66] Mackprang tried to take advantage of the fall in the forward rate for the French franc and profit from a German dealer by buying grain in France and reselling it to a German intervention agency, EVGF. The Community adopted a decision authorising the German Government to confine intervention purchases of wheat and barley to German-grown products. The decision came into force on 8th May and it did not apply to cereals offered to the agency before it came into force. Mackprang bought wheat in France and intended to resell it to a German agency. On 8th May, most of the wheat was on board a ship and on transit to Germany, thus Mackprang could not make any offer. When it arrived, the agency refused to buy from Mackprang. Mackprang took an action on the ground that he had legitimate expectation that he could sell

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66 [1975] ECR 607.

those wheat to the agency. However, it was held that this was a speculative transaction. Thus, there was no legitimate expectation in this case.[67]

(5) Principle of proportionality

Under this principle, the authority in making decisions is required to weigh the interests involved in a particular case. This principle is evident in section 3:4 of the General Administrative Law Act[68] which states:

> "1. In making an order an administrative authority shall weigh the interests directly involved, in so far as limitation is placed on this duty by a statutory regulation or by the nature of the power to be exercised.
>
> 2. The adverse consequences of an order for one or more interested parties may not be disproportionate in relation to the purposes to be served by the order."

The principle of proportionality is well established under the European administrative law. Under this doctrine, an administrator is supposed to act not in excess of what is required by law. If he does, it constitutes disproportionality.

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67 The principle of legitimate expectations has also been applied in cases of natural justice under the common law system. These are well illustrated in Schmidt v Secretary of State for Home Affairs [1969] 2 Ch. 149, A.G. Hong Kong v Ng Yuen Shiu [1983] 2 AC 237. The Malaysian Supreme Court applied the doctrine in J.P. Berthelesen Director General Immigration Malaysia and Ors [1987] 1 MLJ 134. More recently, the principle of substantive legitimate expectation was adopted in Malaysia in Sykt. Bekerjasama-sama Serbaguna Sungai Gelugor v MPPP [1996] 2 MLJ 697.

68 This is a Dutch statute.

This is an unwritten principle based on equity. To determine whether the action is in excess, the court would look into the purpose of the law and then would see whether the action is excessive or necessary. If the action is necessary, then the action is said not to be disproportionate. Thus, it leaves a great deal of discretion to the judgment of the court. The principle of proportionality is very important in the sphere of economic law, since this frequently involves imposing taxes, levies, charges or duties on businessmen in the hope of achieving economic objectives. For example in Skimmed Milk Powder's case,[69] the Council had forced animal feed producers to use skimmed-milk. The used of skimmed-milk as protein element was three times more expensive than soya. The court held that the scheme was invalid on the ground that the scheme was discriminatory and had offended against proportionality principle because the imposition of obligation to purchase skim milk powder was not necessary to diminish the surplus.[70]

Comparatively, the concept of proportionality as ground of review under the common law is more uncertain. In R v Secretary of State for the Home Department, exp. Brind,[71] the House of Lords was reluctant to use the principle of proportionality because according to the court if this principle is used, the court had to go to the merits of the case. Nevertheless, Lord Roskill,

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69 Case 114/76, Bela-Muhle Josef Bergman v Grows-Farm [1977] E.C.R. 1211.

70 Also refer to Buitoni's case, Case 122/78 [1979] 2 C.M.L.R 665 and R v Intervention Board for Agriculture, Case 181/84 [1985] E.C.K. 2889.

71 [1991] A.C. 696.

acknowledged that Lord Diplock had, in G.C.H.Q. case[72] held that the principle of proportionality is open for future development but the development was not appropriate in the present case.[73] On the other hand, in R v Bransley M.B. ex.p.[74] the court had tried to use the principle of proportionality indirectly.[75] At the moment, the common law lacks more general consideration of the said concept. In Malaysia, the position is even more uncertain after the recent Federal Court case of Ng Hock Cheng v Pengarah Am Penjara & 2 Ors[76] which overruled the earlier Court of Appeal case of Tan Tek Seng v SPP & Anor[77] on the narrow point of proportionality of punishment.

(6) The principle of *detournement de pouvoir*

This principle prohibits the abuse of power by the administrator. This principle is manifested in section 3:3 of the General Administrative Law Act which provides:

> "An administrative authority shall not use the power to make an order for a purpose different from that for which it was conferred."[78]

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72 [1985] A.C. 374 at p. 410.

73 [1991] 1 A.C. p. 696 at p. 749-750.

74 [1976] 1 W.L.R. 1052.

75 *Id.*, at p. 457 and 461.

76 [1997] 4 AMR 4193.

77 [1996] 1 MLJ 261.

78 The equivalent common law principle is 'improper purpose' as illustrated by Sydney M. Corp. v Campbell [1925] AC 338.

5. Application of due administration in Indonesia

In Indonesia, there are legal scholars who favour the elements of the principles of due administration. However, the principles discussed are based on the writings of some Dutch writers. For example, Kuntjoro referred to the opinion of R. Crince Le Roy in the advance course *(penataran lanjutan)* on Administrative Law at the Faculty of Law, University of Airlangga in 1976.[79] Kuntjoro listed thirteen elements, of which the last two elements are his own addition. The elements are as follows:[80]

(a) principle of legal security *(azas kepastian hukum)*,

(b) principle of proportionality *(azas keseimbangan)*,

(c) principle of equality *(azas kesamaan dalam mengambil keputusan pangreh)*,

(d) principle of carefulness *(azas bertindak cermat)*,

(e) principle of motivation *(azas motivasi untuk setiap keputusan pengreh)*,

(f) principle of abuse of power (*azas jangan mencampuradukan kewenangan*),

(g) principle of fair play *(azas permainan yang layak)*,

(h) principle of reasonableness or prohibition of arbitrariness *(azas keadilan atau kewajaran)*,

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79 Simamora, Jonny, "Penemuan Azas-azas Pemerintahan yang Baik dalam Sengketa Tata Usaha Negara oleh Hakim pada Mahkamah Agung Republik Indonesia." Master of Law, University of Airlangga, Surabaya, Indonesia, 1995, p. 21.

80 Purbopranoto, Kuntjoro, Beberapa Catatan Hukum Tata Pemerintahan dan Peradilan Administrasi Negara (Bandung: Penerbit Alumni, 1975), p. 29-30.

(i) principle of meeting raised expectation *(azas menanggapi pengharapan yang wajar)*,

(j) principle of undoing the consequences of an anulled decision *(azas meniadakan akibat-akibat suatu keputusan yang batal)*,

(k) principle of protecting the personal way of life *(azas perlindungan atas pandangan hidup (cara hidup pribadi))*,

(l) principle of discretion *(azas kebijaksanaan, sapienta)*, and

(m) principle of public service *(azas penyelenggaraan kepentingan umum)*.

Indroharto, former Deputy Chief in the field of Administrative Law of the Supreme Court, on the other hand explained that the principles of due administration are the unwritten norms and they apply to an administrative action which is individual in nature and do not apply to general regulations made by the government that are binding.[81] He further discussed the elements of the principles of due administration by referring to the work of W. Konijnenbelt, "Hoofdlijnen van Administratiefrecht". The principles involved consist of the following:[82]

(1) The principles of Formal Formation of Decision *(Asas-asas Formal mengenai Pembentukan Keputusan)* which includes:

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81 Indroharto, Usaha Memahami Undang-undang Peradilan Tatausaha Negara Buku II, p. 177-178.

82 *Id.*, p. 179-184.

(a) The principle of formal carefulness *(asas kecermatan Formal)*

Under this principle, an administrator is obliged to be careful and meticulous when making decisions and ensure that at the moment of making a decision, the administrator must be clear on all the relevant facts and interests, inclusive of the interests of a third party. Thus, an administrative body must seek the truth from the views of the parties concerned. In carrying out this obligation, the administrative body must hear evidence from the interested parties. All the evidence must be considered in making a decision.[83]

(b) Principle of Fair Play

Under this principle an administrative body must act fairly in its decision making affecting individual. The application of this principle is only limited to bias. For example, if an individual made an appeal within the administration, the administrative body that has made the decision must not attempt to influence the relevant administrative body that is hearing the appeal to reject the application. If the appellate body that hears the appeal is influenced by the administrative body that has made the decision at first instance, the decision is said to be biased; and the decision of the administrative appellate body could be challenged on the ground that the decision is contrary to the principle of fair play.[84]

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83 Under the common law system, in an oral hearing the adjudicating authority is obliged to give the person concerned opportunity to produce evidence to support his case and rebut the case against him and all the relevant evidence must be considered in making decision.

84 By way of comparison, this principle is similar to the principle of *nemo judex in causa sua*, i.e., the rule against bias, under the common law.

(2) Principle of Formulation on Decision Making *(Asas-asas Formal Mengenai Formulasi Keputusan)*

This principle includes:

(a) Principle of consideration

According to the principle, the decision of an administrative body must be supported by the true and relevant facts. Thus, in making a decision, an administrative body is required to take into account relevant considerations.[85]

(b) Principle of Formal Legal Certainty *(Asas Kepastian Hukum Formal)*

Under this principle, the decision of an administrative body must be certain. For example, if a decision involves the taking of an action against an affected person within a certain time period, that time period must be stated clearly in the administrative decision.

(3) Principle of Material Content of the Decision

This principle includes:

(a) principle of material legal certainty;
(b) principle of legitimate expectations;
(c) principle of equality;
(d) principle of material meticulousness or carefulness; and
(e) principle of Proportionality.

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85 Under the common law, this principle is applied under the use of discretionary power whereby an administrator is required to take into account the relevant considerations in making his decisions.

Amarullah Salim, Former President of the Administrative Court of Jakarta, discussed the elements of due administration based on *Pancasila*. According to his observations:[86]

(1) *Pancasila*, as the Philosophy of the people of Indonesia, is the special feature of the Indonesian Constitution in determining the directions and ways to solve problems in the society in order to achieve a balanced, just and prosperous society both materially and spiritually.

(2) By virtue of the status and function of *Pancasila*, the *Pancasila* is to be applied in every day life.

(3) The *Pancasila* has to be applied as the State Foundation, which forms the basis of all sources of law found in the 1945 Constitution as spelled out in the Broad Guidelines of the State Policy *(Garis Besar Haluan Negara* - GBHN) which are to be applied as the development strategy of the citizens of Indonesia.

Reverting to the discussion of due administration in Indonesia, even though the principles of good or due administration are not included expressly in Law No. 5 of 1986, articles 14 and 27 of Law No. 14 of 1970 can still be used as a basis to incorporate those principles. Article 14 provides that a judge has a duty to hear an application even though the law was not clear on the matter, while article 27 states that a judge who upholds the law and justice must understand and abide the legal norms that operate within the society. Law No. 14 of 1970 is used because it provides for the General Rules on Judiciary in Indonesia which govern the jurisdiction of the four spheres of the judicature, i.e., General Courts, Religious Courts, Military Courts and Administrative Courts.

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86 Simamora, *op.cit.*, pp. 22-23.

Based on decided cases,[87] there are four principles of due administration in Indonesia. They are:

Principle of formal meticulousness or carefulness

This is a concept regarding the procedure. For example, before an affected person is dismissed, he should be given the opportunity to defend himself.

Principle prohibiting arbitrariness

This principle already been dealt with before.

Principle of fairness

According to this principle, an administrative body in making decisions must treat similar cases alike.[88]

Principle of equality

This principle, too, has already been dealt with before.

6. Cases on due administration in Indonesia

The following cases illustrate the application of the principles of due administration in Indonesia. In a case decided by the Medan Administrative Appeal Court, Direktur Utama PT. Inwangi & Co. v Gebenur KDH Tk. I

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87 Cases no. 6K/TUN/1992, No. 10/TUN/1992, No. 34K/TUN/1992, No. 48K/TUN/1992, No. 36K/TUN/1993, No. 37K/TUN/1993 and No. 45K/TUN/1993.

88 Under the common law system, the concept of fairness was initially applied in the area of right of hearing, i.e., in ReK(H) - an infant [1967] 1 All E.R. 226. Later, this concept was developed and applied in the area of discretionary power, i.e., in Preston v IRC [1985] 2 All E.R. 326.

Propinsi Sumatera Selatan and others[89] the first defendant, the governor, in 1988 had made a decision allowing the complainant to carry out farming activities on a piece of land. The activities must be carried out within one year from the date of permission; failing which the permission becomes void automatically. The complainant had failed to carry out farming activities within the specified period and so the first defendant annulled the permission given to the complainant in 1988. The complainant challenged the decision on the ground that it was contrary to the law and the general principles of due administration in the sense that there was an act of arbitrariness. The Administrative Court of Palembang decided that the decision was void and illegal and ordered the first defendant to make a new order and give due consideration to the reasons given by the complainant. The first defendant appealed to the Administrative Appeal Court in Medan. The Administrative Appeal Court in Medan reversed the decision made by the Administrative Court in Palembang. In its judgment the court stated that:

> "...The procedure that the defendant had gone through before making the decision No. 774/SK/1991 clearly had fulfilled the general principles of due administration by acting: fair play, based on factual fact, careful, questions (letters T. 5, 6) those with interests, ... the defendant ... in making the decision No 774/SK/1/1991 had undergone the proper procedure both in the aspect of authority based on statutory provision and the general principles of due administration, thus it is valid and must stand."[90]

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89 Decision of the Administrative Appeal Court of Medan No. 37/BDG-G/PL/PT/TUN 1992.

90 Gema Peratun tahun II No. 3 Januari 1994, p. 9-10.

In another case, Gubernur Kepala Daerah Khusus Ibukota Jakarta and others v Suparman and others,[91] the complainants were the owners on premises no. 36A, 36B, 36C, 36D, 36E and 36F Jakarta Pusat at Jalan Gunung Sahari VII, based on a tenancy agreement signed with the third defendant. The complainants later received an eviction order from the second defendant on an instruction made by the first defendant, the governor. The Supreme Court held that the eviction order was invalid. This was because in accordance with the principles of due administration, the court pointed out that by not including the owners as parties with important interests in determining the amount of damages to be given to the owners before terminating the tenancy agreements (the building was built by the owners) the second defendant had acted against the principles of formal meticulousness or carefulness *(kecermatan formal)* and thus contrary to the provision of article 53(2)(c). According to this provision:

> "The State Administrative Body or Official in making or failing to make the decision under challenge, after taking into account all the interests affected by the decision should not have made or failed to make that decision."

In H.M.A. Alwi Rais and others v Walikotamadya Kepala Daerah Tingkat II Palembang,[92] the Supreme Court applied the principle of formal meticulousness or carefulness in making decision. In the present case, the claimants were the owners of business premises with licence to operate business.

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91 Supreme Court Decision No. 34K/TUN/1992.

92 Supreme Court decision No. 6K/TUN/1992 dated 31.8.1993.

The Head of the Sub-Division of the Office of Public Order Municipality of Palembang, based on Decision No. 51/STU/1991 dated 6.5.1991 made by the defendant, the District Head of Level II of the Municipality of Palembang, ordered the temporary disclosure of the business premises. The claimants claimed that their names were not included in the Decision No. 51/STU/1991 but on the day the order was carried out, the claimants' premises were included. Thus the claimants challenged the validity of Decision No. 52/STU/1991 dated 6.5.1991. The Administrative Court in considering the case said that the defendant in making Decision No. 52/STU/1991 was carrying out the order under certain regulations in the administration, i.e., District of Palembang Regulation No. 30 of 1959, and Level I District of South Palembang No. 29 of 1960 and these regulations were related to the District of Palembang Regulation No. 8/HUK/83 and the Decision of the Municipal District Head Level II of Palembang No. 99/UM/WK/1984 regarding the renewal of a Business Premise Licence *(Surat Izin Tempat Usaha)*. The Business Premise Licence No. 368/IZ/PP/WK dated 1.9.1971 owned by the first claimant had been renewed on 21.7.1990 whereas the licence No. 1414/IZ/PP/WK dated 3.2.1990 belonging to the second claimant contained a clause providing for renewal of the licence after five years. Based on these facts, and calculated from the date of issuance of the licences and the Decision No. 52/STU/1991 dated 6.5.1991 the licences were still within the period of five years and thus the licences belonging to the first and the second claimants were valid. The court held that the defendant in making the Decision No. 52/STU/1991 was not meticulously careful and had injured the interest of the claimants. The defendant was also said to have acted arbitrarily

because the decision No. 53/STU/1991 contained a defective formal procedure, i.e., the claimants I and II were not informed earlier about the issuance of the Decision No. 52/STU/1991 dated 6.5.1991 and that the implementation was made on the same day. Hence, the court held that the decision made by the defendant was invalid. On the other hand, the claims made by the third and the fourth defendant were rejected because the claim was not clear and the application for licence by the fourth defendant received no reply till date Decision No. 52/STU/1991 was issued.

In another decision of the Supreme Court, Matawi v Bupati Kepala Daerah Tingkat II Gresik[93] the court applied the principle of prohibiting arbitrariness. In this case, the claimant was terminated from his post by the defendant, Head Regent of District Level II Gresik. The termination was based on the ground that the village people had lost confidence in his leadership. However, the ground of loss of confidence was only supported by the decision of seven members of the consultative council of the Village of Lebanirawas out of a membership of seventeen. The other fact that was also taken into account in the defendant's decision was that the claimant was accused of committing an act of adultery but he was not proven guilty of the accusation. In this case, it was held that the defendant had acted arbitrarily in the sense of misdirecting himself in law with regards to the two adverse factors operating against the claimant.

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93 Supreme Court Decision No. 48K/TUN/1992 dated 2.8.1994.

Another important case to be noted is Lindawati v Bupati Kepala Daerah Tingkat II Gianyar.[94] Here the claimant owned a piece of land with the certificate of title No. 580. The Sale Purchase Agreement made by the Sub-district Head Tampak Sirin and certificate of title provided that the land was for building/residential purpose. Further, a Letter of Statement Head Village Manukaya No. 593/57/Pem/1990 dated 20.3.1990 also provided that the claimant's land was not within the green area and the land was for building purposes. The claimant had the intention to build a restaurant/house on the land under dispute. She then applied to the Governor on 17.6.1990 for such a permission but there was no reply. Based on the Statement Letter by the Village Head No. 593/57/Pem/1990, the Sale Purchase Agreement and the Certificate of title of the said land, the claimant built a building on the land. However, four months after the application, the Governor rejected the application on the following grounds:

1. The distance between the claimant's land and Pura Tirta Empul (Pura Dang Kahyangan) was only 500 metre.
2. It was within the radius of security of Palace Tampak Siring.
3. The road border was only six metre from As Road.

On 3.5.1991, the defendant made a Decision No. 640/196/PU/1991 ordering the claimant to demolish her building. If after the time specified the claimant failed to demolish her building, the building would be demolished by force. The

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94 Supreme Court decision 10K/TUN/1992 dated 15.10.1994.

defendant then made a decision No. 46 of 1991 dated 16.3.1991 to order the demolition of the claimant's building by force on 19.3.1991 because the claimant's land was within the green lane *(jalur hijau)*. This reasoning was inconsistent with the grounds of rejection of application by the governor. Besides, there were other buildings on the same lane that were not prohibited by reason of being on the green lane. Therefore, the claimant claimed that the decision by the defendant was illegal. Based on the evidence before the court, the court found that though there were other buildings on the green lane, only the claimant's building was demolished. Hence, the court said that defendant's action was against the principles of due administration by not giving equal treatment. The court then held that since the order to demolish was only given to the claimant, defendant's action was contrary to District Regulation No. 8 of 1983.[95] In view of this reasoning, the Decision No. 46 of 1991 dated 16.3.1991 and Decision No. 640/196/PU/1991 dated 5.3.1991 were held invalid.

7. Conclusion on the application of principle of due administration in Indonesia.

Thus with the application of principles of due administration as grounds to review the validity of the administrators' actions or decisions, the Indonesians may claim that they have a slightly wider protection against an administrative actions in comparision with common law countries. Even though the application of the principles of due administration is not clearly stated under

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95 Regulation regarding restriction on the development within the green lane.

Law No. 5 of 1986, yet based on decided cases,[96] the Judges are willing to accept these principles as grounds to review the validity of the administrative decisions or actions. The status of the Dutch principles of due administration can be likened to the English common law principles in countries like Malaysia and Singapore. Perhaps, an approach similar to that taken in Malaysia and Singapore could also be followed in Indonesia - a provision could be inserted in the relevant Indonesian statute to the effect that in the event of a lacuna in the local law, the Dutch principles apply.

IX. CONCLUSION

This chapter has attempted to cover a wide range of matter from principles, characteristics, aims, organisation, limitation period, *locus standi* and remedies available under the system of Administrative Courts in Indonesia.

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96 Supreme Court Decision No. 34K/TUN/1992, Supreme Court Decision No. 6K/TUN/1992, Supreme Court Decision No. 10K/TUN/1992, Supreme Court Decision No. 48K/TUN/1992 and Administrative Appeal Court Decision No. 37/BDG-G/PL/PT/TUN/1992.

CHAPTER V

ADMINISTRATIVE COURTS (II) - EVIDENCE

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ADMINISTRATIVE COURTS (II) - EVIDENCE

I. PRINCIPLE OF LIMITED FREEDOM ON THE USE OF EVIDENCE

Evidence is any material that tends to prove the existence of the legal fact in a dispute and would be considered by the court in the making of a decision. In Indonesia, on the one hand, an administrative court judge has the power to determine admissible evidence in a proceeding. An Administrative Court has the power to allow the use of evidence and the judge plays an active role in a proceeding. On the other hand, ironically, the law also curtails that very power.

According to article 80 of Law No. 5 of 1986, the judge in an administrative proceeding has the power to issue directive to the disputing parties in relation to the legal avenue and the evidence to be used. Article 107 further provides that the administrative judge may determine what fact must be proven and the burden of proof. However, the validity of his findings must be based on at least two pieces of evidence. The elucidation further explains that the Administrative Court may determine the followings:

(a) what needs to be proven;

(b) the onus of proof, what needs to be proven by the parties in dispute and whatever the Judge himself needs to prove;

(c) evidence to be used in the proceeding; and

(d) the weight of the evidence adduced.

The elucidation of article 107 also explains that the aim of the said article is to allow the judge to get the material truth, that is, the real truth in a hearing.

Further, paragraph 5 of the general elucidation[1] explains that even though the procedure used in the Adminsitrative Court is similar to that used in the civil court, the administrative court judge plays an active role in a proceeding to get the material truth. Therefore, there is freedom on the part of the judge regarding the use of evidence in a proceeding.

Though the general rule is that an administrative court judge is free to determine the admissible evidence, yet article 100 (1) provides a list of admissible evidence in a proceeding:

(a) documents or written evidence;

(b) evidence of expert witness;

(c) evidence of witness;

(d) admissions of the parties; and

(e) the knowledge of the Judge.

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1 General elucidation is the general explanation on the application of Law No. 5 of 1986.

Article 100(2), however, provides that information which is common knowledge does not need to be proven.

Thus in effect the list referred to above curtails the freedom of the judge regarding the use of evidence. Besides, his freedom is also subjected to the requirement of article 107 which provides that in making his finding, the judge must base his decisions on at least two pieces of evidence. Hence, in reality the actual principle practised by the administrative courts in Indonesia is the principle of limited use of evidence in any administrative court proceeding.

On the other hand, under the common law system, an evidence is admissible if it may be received by the court for the purpose of proving facts in accordance with the law of evidence.[2] The general principle of admissibility under the common law is that all relevant evidence is admissible. Regarding the question of onus of proof in civil cases, the general rule under the common law is that the burden of proof lies on the applicant.

There is also a difference between the role of the Indonesian Administrative Court judge and the common law judge in an administrative proceeding. Unlike the Administrative Court judge who plays an active role in an administrative proceeding, the common law judge plays an inactive role throughout the course of the administrative hearing. The difference is

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2 Murphy, Peter. Murphy On Evidence (London: Blackstone Press Limited, 1985), p. 13.

understandable because the Indonesian system adopts the inquisitorial system whereas the common law system practises the adversarial system.

In the common law system where administrative disputes go before tribunals, it may be generally observed that the strict rules of evidence as used in the civil courts do not apply. The adjudicator has more discretion, flexibility to determine the admissibility of evidence in an adjudication. Technicality and formality are lacking. Normally, a quicker disposal of disputes may be expected.

It will be of interest to take a look at the Australian system. In Australia, the Administrative Appeals Tribunal (AAT) Act[3] excludes the use of common law rules of evidence in a proceeding before the Tribunal. According to section 33:-

> "(1) In a proceeding before the Tribunal -
>
> (a) the procedure of the Tribunal is, subject to the Act and the regulations and to any other enactment, within the discretion of the Tribunal; and
>
> (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as requirements of this Act and of every other relevant enactment and a proper consideration of the matter before the Tribunal permit; and

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3 Under the Administrative Appeals Tribunal Act 1975, the Administrative Appeals Tribunal has been established to review on merits a selected group of decisions and actions made or taken under federal laws.

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate."

It must be pointed out that the AAT has adopted a more flexible convenient means of obtaining evidence, i.e., by the use of telephone. In Re S.B. and Director-General of Social Services,[4] the Tribunal received the evidence of an applicant for sickness benefits by way of telephone when she was unable to travel to Sydney from her outer suburban abode.

II. ADMISSIBLE EVIDENCE

A. Documents or written evidence

One of the admissible evidence listed under article 100 of Law No. 5 of 1986 is written evidence or documents. Documents or written evidence are evidentiary. They are categorised into three types under article 101 which are as follows:

(a) authentic official documents;

(b) official documents created underhand; and

(c) other documents which are not official documents.

1. Authentic official documents

These documents are documents created by or in the presence of a public official who has the legal authority to create such a document with the

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4 *C.f.*, Flick, Geoffrey A. Federal Administrative Law (Sydney: The Law Book Company, 1983), p. 48.

intention that it be an evidence of legal action or event contained therein.[5] Legally, these authentic official documents *(akte resmi (otentik))* are perfect evidence *(pembuktian yang sempurna, volledig bewijs)* which means "when a party presents an authentic documents, a judge must accept it and assume that what was written therein did occur to the extent that the judge is not able to order further evidence."[6]

2. *Official documents created underhand*

These documents are created and signed by the relevant parties with the intention that they be evidence of the event or legal action contained therein.[7] These documents would be accepted as authentic documents if both parties admitted to the signatures on the documents, but if there is an objection, then the party which objects has to prove that the signature is falsified.

3. *Non-official documents*

Examples of non-official documents are writings and news from the departments *(Ambtesberichten)* that are related to the matter in dispute *(Achriftelijke strukken)*.[8] The court can order the disclosure of such documents

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5 Art. 101(a).

6 Marbun, S.F. Peradilan Tata Usaha Negara (Yogyakarta: Penerbit Liberty, 1988), p. 129.

7 Art. 101(b).

8 Marbun, *op.cit.*, p. 130.

held by an administrator in a proceeding.[9] The Court may send the documents for examination if there is an allegation of falsification of the documents and the proceeding would be postponed until the criminal court makes a decision on the matter.[10]

B. Expert evidence

Article 102 defines expert evidence as the opinion of an expert given under oath at the hearing regarding the matters about which he or she is knowledgeable by virtue of his or her experience or knowledge. Under article 103, the Panel Judge, at the request of one or both parties, may appoint one or several experts. Once appointed at the hearing, the expert witness must deliver a report, both written and in oral form under oath or affirmation describing the truth to the best of his or her knowledge.[11]

Nevertheless, articles 102 and 103 must be read subject to article 88. Under article 88, the following people are prohibited to be a witness:

(a) a person related by blood or marriage to one of the disputing parties;

(b) the spouse or ex-spouse of one of the disputing parties;

(c) children under the age of seventeen years;

(d) a person suffering from memory loss.

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9 Art. 85(2), (3).

10 Art. 85(4).

11 Art. 84(2).

C. Witness evidence

Every person has a duty to be a witness. If he failed to fulfil the duty without reasonable justification when properly summoned, the judge may order that the witness be escorted to the hearing by the police.[12] However, if a witness resides outside the jurisdiction of the relevant court, he or she is not obliged to attend that court but may be examined by the court with jurisdiction over the place of residence of the witness.[13]

Even though every person has the duty to be a witness, that duty is subject to article 88. Besides, a person can also request for an exemption from becoming witness as provided for in article 89. According to this provision, the following people may request exemption from giving evidence:

(a) Brothers and sisters and brothers-in-law and sisters-in-law of the disputing parties.

(b) Every person who, because of status, occupation or office is obliged to maintain the confidentiality of anything related to the status, occupation or office.

Article 104 states that a witness's opinion shall be considered to be evidence when it deals with matters which the witness has personally experienced, seen or heard. Article 94(1) further provides that each witness is obliged to swear an oath in a court session attended by the disputing parties.

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12 Art 86(2).

13 Art. 86(3).

However, if a witness is prevented from attending a hearing due to a legally acceptable obstacle, the judge with the assistance of the clerk shall go to the witness' place of residence to administer the oath or affirmation and hear and record the evidence.[14]

D. Admissions of the parties

According to article 105, parties to the dispute may make admissions but once a party has made an admission, he or she could not revoke unless he or she has a convincing reason therefor. Whether there is a convincing reason or not, it is for the judge to decide.

E. Knowledge of the judge

Article 106 provides that the knowledge of the judge are facts which the Judge knows and the truth of which he is convinced. Based on the principle of active role of the judge in the administrative proceeding, the judge, if necessary, may visit and examine the relevant premises to evaluate the subject matter of dispute. A good example would be examining the factory which was alleged to have trespassed the boundary line in a dangerous condition.[15]

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14 Art. 94(3).

15 Indroharto, S.H. Usaha Memahami Undang-undang Tentang Peradilan Tata Usaha Negara Buku II Beracara Di Pengadilan Tata Usaha Negara (Jakarta: Pustaka Sinar Harapan, 1994), p. 203.

F. Information which is common knowledge does not need to be proven

This provision is included in Law No. 5 of 1986 in order to emphasise that when there is absolute certainty there need not have to be further proof of evidence. An example of such a situation is that all government offices are closed on Sundays and public holidays.[16]

III. OBSERVATIONS

In Indonesia, though an administrative court judge is free to determine the admissible evidence, yet Law No. 5 of 1986 contains provisions which restricts that freedom. It is difficult to comprehend why the restrictions are imposed. It is hoped that the said restrictions will be removed and a wider discretion along the line of the Australian AAT Act should instead be considered.

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16 Marbun, *op.cit.*, p. 142-143.

CHAPTER VI

ADMINISTRATIVE COURTS (III) -

PROCEDURE

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ADMINISTRATIVE COURTS (III) - PROCEDURE

I. INTRODUCTION

One of the aims of establishing Administrative Courts in Indonesia is to have a systematic way of providing legal protection for the citizens of Indonesia against administrative decisions. Thus it is important to understand the procedures in settling administrative disputes according to Law No. 5 of 1986. This chapter is devoted to discuss certain important principles in relation thereto:

1. avenues to challenge administrative decision;
2. rules of procedure;
3. implementation of the court decision; and
4. role of the administrative body in an administrative dispute.

II. AVENUES TO SETTLE ADMINISTRATIVE DISPUTES

As already discussed earlier, there are two avenues of resolving administrative disputes in Indonesia.

According to article 47, the Administrative Court has the duty and authority to hear, decide and settle all administrative disputes. However, if an administrative body or official is given the authority to settle disputes through administrative review process, then such disputes must be resolved through the existing avenues of administrative review.[1] The administrative court shall only come into the picture after the relevant existing avenues of administrative review have been exhausted.[2] It further provides that the Administrative Appeal Court has the duty and authority to hear, decide and settle at first instance administrative disputes falling under article 48.[3] However, a decision of the Administrative Appeal Court may be subjected to a request for cassation to the Supreme Court. Cassation is the appellate jurisdiction of the Supreme Court beyond which cases cannot go any further. This constitutes the first avenue of settling administrative disputes.

Where there is no provision regarding administrative review process within the administration, then a complaint against an administrative decision may be made directly to the Administrative Court which would act as the court of first instance.[4] An appeal against the decision of the Administrative

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1 Art. 48(1). This refers to domestic remedies within the administration expressly provided for by law.

2 Art. 48(2).

3 Also refer to Panitia Penyelesaian Perselisihan Perburuhan Pusat (P4P) v PT Santa Mas Delta Raya Construction Supreme Court Decision Reg. No. 37K/TUN/1993.

4 Art. 50.

Court may be made to the Administrative Appeal Court.[5] The last stage of appeal is to request for a cassation to the Supreme Court. This constitutes the second avenue of resolving administrative disputes.

III. PROCEDURE

A. TYPES OF PROCEDURE

The rules of the procedure in the Administrative Court consist of material procedure and formal procedure.

B. FORMAL PROCEDURE

1. Normal Procedure

(1) Procedure prior to proceeding

(a) Filing a claim

A claim is defined as a request in the form of a demand to an Administrative Body or Official and submitted to a court for judgement.[6] The elucidation of article 53(1) explains that an individual or civil law body which may make a complaint to challenge a decision of the administrative body as invalid or void if he or she feels that his or her interest has been injured by the administrative decision. In addition to that, the claimant may also claim damages, and in case of civil servants, a claim for rehabilitation.[7]

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5 Art. 51(1).

6 Art. 1:5.

7 Reinstatement.

The procedure for filing a complaint against an administrative decision is provided in article 56, which is as follows:

> (1) The claim must consist of:-
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> (a) the name, nationality, place of residence and occupation of the claimant or his or her representative;
>
> (b) the position and location of the defendant;
>
> (c) the basis of the claim and the matter which the Court is requested to decide.
>
> (2) When a claim is made and signed by a representative of the claimant, the claim must be accompanied by a valid delegation of authority.
>
> (3) The claim must, whenever possible, be accompanied by the Administrative decision disputed by the claimant.

If the claim is signed by a representative of the claimant, there must be a delegation of authority which may be made in writing or orally at a Court hearing.[8] If the delegation is made outside Indonesia, it must be made in a form complying to the law of the relevant country with the knowledge of the Representative of the Republic of Indonesia in that country and then translated into Indonesian language by an official translator.[9]

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8 Art. 57(2).

9 Art. 57(3).

In the case of an illiterate claimant, a complaint can be made orally to the clerk *(Panitia)* who would assist the claimant to put the matter in writing. A claimant must fulfil the requirements mentioned, failing which, the court may refuse to accept the claim.[10]

There are other requirements that need consideration - whether the matter under dispute could be resolved through administrative process and the limitation period in making a complaint.

The two avenues of settlement of administrative must be reiterated. They are:

(1) Direct settlement *(langsung)*, which means, administrative remedy in the matter under dispute is not available within the administration. Thus, the matter is under the absolute competency of the Administrative Court.

(2) Indirect settlement *(tidak langsung)*, which means, administrative remedies are available in the matter under dispute.

The two avenues of dispute settlement have already been discussed in Chapter IV. No further discussion thereon is necessary here save for one matter. One may ask why in cases where administrative remedies are available

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10 Art. 97(7)(c).

within the administration, the administrative review process does not start at the Administrative Court but at a higher level in the Administrative Appeal Court. The rationale is that during the domestic administrative review process, the judge of the administrative body has already disposed of the matter based on both legal and policy rules. Thus, it is unnecessary to subject the dispute to the Administrative Court because the administrative dispute has to go through again a more or less similar process as in the administrative review process below. Moreover, by requiring such a matter to go straight to the Administrative Appeal Court, it may also save time and costs.

(b) Fees

Generally, the claimant must pay fees in advance. They are fixed by the Court Clerk when a complaint is filed in court.[11] Nevertheless, the claimant may submit an application to the court to waive the fees.[12] The request must be made at the time the claimant submits his or her claim and shall be accompanied by an explanatory letter confirming their inability to pay which is written by the local or village headman of the applicant's place of residence.[13] The explanatory letter must state that the claimant is genuinely unable to pay the fees.[14] The request must be checked and the approval declared by the court

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11 Art. 59(1).

12 Art. 60(1).

13 Art. 60(2).

14 Art. 60(3).

before the hearing of the dispute and the declaration is final.[15] The declaration of the Court approves the claimant's request for waiver of the fees at first instance and it is also valid at the level of appeal and cassation.[16]

In filing a claim, the claimant must pay deposit on the fee which is actually a cash advance the amount of which would be determined by the court clerk. The cash advance is for the costs involved in adjudicating the disputes. According to art. 111, the Court costs comprised of the costs incurred by the Secretariat, witnesses, experts, interpreters, the costs of materials, holding a hearing in a place other than the Court room and other costs necessarily incurred in making the decision according to the Presiding Judge of the Session. Article 4(2) of Law No. 14 of 1970 provides that a proceeding must be simple, fast and the fee is not burdensome *(biaya ringan)*.

(c) Registration of claim

After the claimant has paid the fees, the claim shall be registered by the Court Clerk on the register of cases.[17] In line with Circular of the Supreme Court No. 2 of 1991 dated 9th July 1991, the deposit fixed by the Court Clerk must not be less than Rp 50,000. However, if there is a waiver of fees, the claim would only be registered in the register of cases after the declaration of the Court upholding the claimant's request for a waiver.

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15 Art. 61(1), (2).

16 Art. 61(3).

17 Art. 59(2).

(d) Preliminary procedure

The term 'preliminary procedure' is not found in Law No. 5 of 1986. It deals with the procedure of dismissal of a claim and the preparatory hearing.

Dismissal procedure *(Rapat Permusyawaratan,* consultative meeting)

This is a process whereby the court, through a consultative meeting may accept or dismiss a claim. According to article 62(1), the Chief of the Court in the consultative meeting which consists of the judges and clerk, has the authority to dismiss a claim if:

(a) the basis of the claim does not fall within the jurisdiction of the court.

(b) the conditions contained in article 56[18] have not been fulfilled by the claimant despite him or her having been informed and reminded of them.

(c) the claim is not based upon reasonable grounds.

(d) the demands made in the claim have already been met by the administrative decision under challenge.

(e) the claim was submitted prematurely or after the expiry of the prescribed time limit.

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18 The claim must contain: the identity, address and occupation of the claimant or his representatives; position and location of the defendant; the basis of the claim; the claim must be accompanied by a valid delegation of authority if it is made by a representative and lastly, whenever possible, the claim must be accompanied by the Administrative Decision disputed by the claimant.

If the claim is dismissed, the claimant has the right to object by submitting an objection to the Administrative Court of first instance within 14 days after the declaration is announced.[19] Such an objection shall be submitted in accordance with the provisions of article 56.[20] The objection shall be heard by the Court in short proceedings. If the objection is upheld by the court, the dismissal fails at law and the dispute shall be heard, decided and settled according to the normal proceedings.[21] However, there is no legal avenue to challenge the decision on the objection.

Preparatory hearing

Prior to the hearing of the investigation of the basis of the dispute, the judge is obliged to hold a preparatory hearing to clarify a claim which is ambiguous.[22] In the preparatory hearing, the judge:[23]

(a) is obliged to advise the claimant to improve the claim and complete it within a period of thirty days; and

(b) may request an explanation from the Administrative Body or Official involved in the dispute.

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19 Art. 62(3)(a).

20 Art. 62(3)(b).

21 Art. 62(5).

22 Art. 63(1).

23 Art. 63(2).

The above provision provides a form of assistance to gather information or data required during the proceeding. If the claimant fails to complete their claim within 30 days, the Judge may declare that the claim will not be accepted.[24] The decision of the Judge is not subject to legal challenge, but a fresh claim may be submitted.[25]

By way of comparison, it may be noted that in Australia, section 34 of the AAT Act allows the Tribunal to hold a preliminary conference with the parties of the dispute, if it thinks desirable to do so. In the conference, the parties may come to an agreement as to the terms of the decision of the Tribunal in the proceeding that would be acceptable to the parties. However, in reaching a decision, the AAT is not bound by any agreement reached by the parties at a preliminary conference as its function is to review the decision of the administrator, not the reasons for that decision, and to make up its own mind as to what decisions should be made.[26] It must be noted that the Indonesian preparatory hearing procedure appears at least to be slightly more attractive than the Australian procedure.

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24 Art. 63(3).

25 Art. 63(4).

26 Flick, Geofrey A. Federal Administrative Law (Sydney: The Law Book Company Limited, 1983), p. 49.

(e) Fixing the hearing date

Within 30 days after the claim is registered, the Judge shall specify the date, time and place for hearing and the Judge shall order the parties to the dispute to attend the hearing at the date, time and place mentioned.[27] In fixing the date of hearing, the Judge shall consider the distance between the venue of the hearing and the place where each party resides.[28]

(f) Summoning of parties

Subsequent to the fixing of the hearing date, the Judge will make an order for the parties to the dispute to attend the hearing. A letter of notice together with a copy of the claim is given to the defendant informing him or her that the claim may be answered in writing.[29] The time period between the summoning of the parties and the date of the hearing shall not be less than six days, unless if the dispute must be heard with rapid procedure.[30] The summoning of the disputing parties shall be considered valid at the time each party has received the summons by way of a registered letter.[31]

But if one of the parties resides outside the country, the court shall issue a summons specifying the hearing date and a copy of the claim to the

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27 Art. 59(3).

28 Art. 64(1).

29 Art. 59(4).

30 Art. 64(2).

31 Art. 65.

Department of Foreign Affairs of the Republic of Indonesia.[32] The Department shall then deliver the summons and a copy of the claim through the Representative of the Republic of Indonesia in the territory where the defendant resides.[33] The officials of the Representative of the Republic of Indonesia are obliged to report to the relevant Court within a period of seven days from the issue of the summons.[34]

(2) Proceeding in open court

(a) General procedure

Hearing then ensues. For the purpose of hearing, the Presiding Judge of the session shall open the session and declare it open to the public.[35] If the judge fails to make such a declaration, the Court decision may be declared as void in law.[36] But, if the Judicial Council considers that the dispute involves public order or national security, the session may be declared closed to the public.[37]

During the hearing, the Presiding Judge shall read the contents of the claim and letter containing a reply to it, but if there is no letter of reply, the

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32 Art. 66(1).

33 Art. 66(2).

34 Art. 66(3).

35 Art. 70(1). See also s. 35 of the Australian AAT which has a more or less similar provision.

36 Art. 70(3).

37 Art. 70(2).

defendant shall be given the opportunity to submit a reply.[38] After the contents of the claim and the letter of reply has been read, the judge shall give the opportunity to the disputing parties to clarify any matters raised by either party.[39]

The claimant is then given the opportunity to alter the reasons underlying his or her claim up to the counter plea *(replic)* stage, but he or she must have sufficient reason to do so and that such an alteration will not prejudice the interests of the defendant.[40] The evaluation whether the claimant has sufficient reason shall be made by the Court.[41] The same applies to the defendant up to the rejoinder (*duplic*) stage.[42] The primary aim in allowing alteration to be made is to clarify the main issue in the dispute.

Generally, the claimant is allowed to retract his or her claim any time before the defendant submit his or her reply.[43] However, if the defendant has submitted his or her reply to the claim, retraction of the claim by the claimant shall only be permitted by the Court with the consent of the defendant.[44]

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38 Art. 74(1).

39 Art. 74(2).

40 Art. 75(1). "Counter plea" means reply to counter claim.

41 *Ibid.*

42 Art. 75(2). "Rejoinder" means rebuttal.

43 Art. 76(1).

44 Art. 76(2).

In each hearing, the clerk must prepare and keep minutes thereof as an official report which could not be challenged save where it is proven to the contrary.[45] The mandatory procedure on minutes of hearing had been decided by the Supreme Court in a matter No. 223K/Sip/1975 between Dirik Moningka dkk v Corenus Leornadus Adrianus Wakking and Pieterus Rarung.[46] In that case the court held that if there is any failure to follow that procedure, the decision would be taken to be made not on proper procedure and, consequently, the relevant court must conduct a re-examination and make a fresh decision based on the minutes.[47]

(b) Intervention

Intervention is the participation of a third party in the dispute of another party. Intervention may happen during the hearing stage[48] or during the implementation of the legally enforceable Court decision.[49] According to the elucidation of article 83(1) and (2), any person or civil law body may participate in the dispute of another party currently being heard by the Court. This may happen in three ways:

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45 Hadjon, et al., *op.cit.*, p. 349.

46 *Ibid.*

47 *Ibid.*

48 Art. 83.

49 Art. 118.

(1) The third party may on their own initiative, wish to defend his rights and interests from being prejudiced by the decision of the Court in the proceeding.[50] The applicant must submit an application to the Court requesting for an intervention.[51] The request may be granted or refused by the Court in a decision included in the report of the hearing proceedings.[52] If the request is granted by the Court, the third party is an independent party known as intervener.[53] But if the request is rejected by the Court, the decision is not subjected to an independent right of appeal, but must be appealed in conjunction with an appeal against the final decision on the main claim.[54]

(2) A third party may also join in the hearing proceedings by a request made by either the claimant or defendant in the dispute.[55] If the request is made by the claimant, the third party stands as an 'intervener - second claimant'. On the other hand, if the request is made by the defendant, the third party stands as 'an intervener - second defendant'.[56]

(3) A third party may join in the hearing proceedings on the Judge's initiative.[57]

Although article 83 allows intervention by a third party in a proceeding, the use of this article is limited by specific legal provisions.

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50 Elucidation of art. 83.

51 *Ibid.*

52 *Ibid.*

53 Art. 83(2).

54 Art. 83(3).

55 *Ibid.*

56 *Ibid.*

57 Art. 83(1).

According to Indroharto,[58] there are differences between the application of the intervention procedure in the civil law and the procedure in Law No. 5 of 1986. In the civil procedure the third party may join in the proceeding and stands as an intervener-claimant II or intervener-defendant II regardless of their status. But, in the Administrative Courts procedure, a third party who is an individual or civil law body may only intervene in the hearing proceedings as intervener-claimant II and a third party who is an Administrative body or official may only stand as intervener-defendant II. This is due to the provisions in articles 1:4, 1:5 and 1:6 of Law No. 5 of 1986 which provide that the claimant is an individual or civil law body, while the defendant is the Administrative body or official.

The case of Tjoeng Nie Shao v Kepala Dinas Perumahan Daerah Khusus Ibukota Jakarta, Firina, Harco and P.T. Harco Indah[59] illustrates the application of article 83(1). In that case Harco was made the intervener-defendant I while P.T. Harco Indah was the intervener-defendant II. However when the case was brought before the Supreme Court, the court held that the intervention of the intervener defendant I and II was contrary to Article 83 of Law No. 5 of 1986. This was because even though the intervention was made on the initiative of the Judge but based on the complaint made which formed the basis of the dispute, the intervention was made by the claimant itself. Therefore Harco and

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58 Indroharto, "Beberapa cacatan khusus tentang pasal 83 UU No. 5 Tahun 1986", Gema Peratun Year II No. 3 January 1994, p. 69.

59 Reg. No. 21K/TUN/1992.

P.T. Harco Indah could not stand as intervener-defendant I and II. They should stand as witnesses.

Indroharto further explains that different procedures applies in the civil and Administrative Court.[60] In the civil court procedure, the decision of the court binds only the parties to the disputes and it is a *dictum* from the civil court that orders the parties to the disputes to obey the court decision. On the other hand, in the Administrative Court procedure, such a *dictum* is not necessary because an Administrative Court decision has the affect of a public law decision which is general in nature and binds everyone *(erga omnes)*.

(c) Scrutinising dispute documents

According to article 81, the claimant, defendant and their legal advisors may scrutinise the disputed documents and other relevant official documents within the secretariat and make any extracts thereof which they require with the permission of the Court. The elucidation of article 81 further explains that the party may scrutinise the documents before, during or after the hearing, and after the decision of the dispute. The parties involved may, using their own money, make copies of or extracts from any documents of their case with the permission of the Court.[61]

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60 *Id.*, p. 70.

61 Art. 82.

If there is a request for an appeal against a decision on administrative dispute by the Administrative Court, at the most 30 days after the request is registered, the clerk shall inform the two parties that they may see the case file at the office of the Administrative Court 30 days after receiving the information.[62] A copy of the decision, the report of proceedings, and other relevant documents must be sent to Clerk of the Administrative Appeal Court within 60 days of the request for leave to appeal.[63]

Article 141 provides that the Clerk is responsible for the management of case files, decisions, documents, official documents, registers, case fees, third party deposits, valuable documents, evidence and other documents held by the secretariat, and no registers, notes, minutes, report of proceedings and case file may be removed from the secretariat office except with the permission of the Court or under provisions of law.

(d) Administrative Court decision

When the hearing of an administrative dispute has been completed, the parties involved in the dispute will be given an opportunity to submit their respective conclusions.[64] Thereafter, the Court shall adjourn the sitting and the

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62 Art. 126(1).

63 Art. 126(2).

64 Art. 97(1).

bench is given the opportunity to consult in closed session and evaluate all the evidence relevant to the case.[65]

The decision arrived at during the consultation of the bench guided by the Presiding Judge of the Bench shall represent the product of unanimous consensus.[66] But if such unanimous consensus is not possible, the decision shall be determined based on the decision of the majority of the bench known as *permuafakatan bulat*. However, if the consultations failed to achieve a decision, the consultation process shall be postponed until the subsequent consultative meeting of the bench.[67] If in the subsequent consultative meeting the bench failed to achieve a majority decision, then the final decision of the Presiding Judge of the Bench shall be decisive.[68] The Court may deliver the decision in a public session on the same day or postpone it to another day but the Court must inform the parties involved.[69]

The decision of the Court may be in the form of:[70]

(a) rejection of the claim *(ditolak)* which means the decision of the administrative body stands;

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65 Art. 97(2).

66 Art. 97(3).

67 Art. 97(4).

68 Art. 97(5).

69 Art. 97(6).

70 Art. 97(7).

(b) Upholding the claim which means not allowing the decision of the administrative body either as a whole or in parts;

(c) refusal to accept the claim *(tidak diterima)* which means the claim has not fulfilled the conditions required; or

(d) dropping of the claim *(gugur)* which means all the parties or person authorised failed to attend the hearing as specified after being reasonably informed.

If the claim is upheld, the Court may specify the following obligations:[71]

(a) revocation of the Administrative Decision under dispute;

(b) revocation of the Administrative Decision under dispute and the substitution of a new Administrative Decision; or

(c) in the case of a claim based upon article 3 (failure of Administrative body to make a decision), the making of an Administrative Decision.

An additional order may be granted, i.e., an order of compensation,[72] and in the case of a dispute regarding the public servant, a rehabilitation order.[73]

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71 Art. 97(9).

72 Art. 97(10).

73 Art. 97(11). Rehabilitation order is an order of reinstatement.

The decision of the Court shall be announced at a public sitting[74] and failure to comply with this provisions shall result in the Court's decision being invalid and without the force of law.[75] If one or both parties are not present when the Court announced its decision, a copy of the decision shall be forwarded by registered letter to the relevant party by order of the Court.[76] The decision of the Court must contain:[77]

(a) A heading of:
"In the Name of Justice Based on a Belief in One Almighty God";

(b) the name, office, nationality, place of residence or location of the parties in the disputes;

(c) a precise summary of the claim and the reply of the defendant;

(d) a consideration and evaluation of all evidence submitted and all matters arising in the course of the hearing of the dispute;

(e) the legal reasoning forming the basis of the decision. According to article 23:1 of Law No. 14 of 1970, the decision must include the relevant provisions of the written law and the relevant sources of unwritten law that have been taken into account in the making of the decision. Failure to comply with this requirement shall render the decision of the Court invalid;

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74 Art. 97(6) and art. 108(1).

75 Art. 108(3).

76 Art. 108(2).

77 Art. 109.

(f) awarding order and costs. The Court must consider all claims made in the complaint, determine the amount and who would incur the costs of the dispute. Included in the computation are clerical, stamp, witness costs (costs of maximum five witnesses shall be incurred by the party that lost) and the costs of examination of premises.[78] The total costs which are to be paid by the claimant or the defendant shall be noted in the final orders of the Court;[79] and

(g) further particulars encompassing the day and date of the decision, the names of the Judges on the bench, the name of the Clerk and a summary of the attendance or non-attendance of the parties must be furnished.

Failure to comply with the requirements mentioned may render the Court decision void.[80] Within 30 days of the announcement of the Court decision, the decision must be signify by the Judge who made the decision, and the Clerk of the hearing.[81] If the Judge of the Bench, or in the case of a hearing with rapid procedure, the Judge of the Session, is unable to signify the decision, it shall be signed by the Chairperson of the Court with a statement that the relevant Judge is prevented from signing.[82] If Members of the Judicial Bench (*Hakim Anggota Majelis)* were prevented from signing the decision, it shall be signify by the Presiding Judge of the bench with an explanation that the relevant Judges were unable to signify.[83]

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78 Hadjon, *et al., op.cit.*, pp. 356-357.

79 Art. 112.

80 Art. 109(2).

81 Art. 109(3).

82 Art. 109(4).

83 Art. 109(5).

It must be noted that in the light of the above discussion there are a number of mandatory requirements relating to the making of a decision which may render a decision made invalid.

2. Extraordinary Procedure

Under Law No. 5 of 1986, the extraordinary procedure consists of two types, i.e., first, the rapid procedure *(acara cepat)* and second, the short proceedings *(acara singkat)*. The extraordinary procedure has the advantage of providing a speedy process in the settlement of an administrative dispute. Nevertheless, this procedure may run the risk of arriving at a decision not based on strong facts due to time constraint as compared to the normal procedure. The only ground that justifies a request for an extraordinary procedure is the urgency of the matter. Whether there exists a state of urgency or not is for the Administrative Court Judge to decide.

(1) Rapid procedure

A claimant may request for a rapid procedure in his or her claim, provided he or she has sufficient urgent interests in the matter.[84] The Court is then given 14 days to decide whether to grant or reject the request.[85] The determination is not subject to appeal,[86] and thus rendered the determination as a final decision made by the Court of first instance. If the request is granted, the

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84 Art. 98(1).

85 Art. 98(2).

86 Art. 98(3).

Judge, within seven days after the determination, shall fix the day, time and place for the hearing without the preparatory investigation procedure.[87] The hearing of the rapid procedure shall be presided by a single Judge.[88] The parties in the disputes are given not more than fourteen days to reply and produce evidence.[89]

(2) Short proceedings

Short proceedings may arise in two situations. First, when there is an objection and secondly, if there is an extreme urgency that the interest of the claimant would be seriously prejudiced if the administrative decision is implemented.[90] An objection may arise if the consultative meeting rejected a claim and it may be submitted to the Court within fourteen days after the declaration is announced.[91] The submission made must be in accordance with the provisions of article 56.[92] The objection shall then be heard in the short proceedings.[93]

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87 Art. 99(2).

88 Art. 99(1).

89 Art. 99(3).

90 Hadjon, *et al., op.cit*,. p. 360.

91 Art. 62(3)(a).

92 Art. 62(3)(b).

93 Art. 62(4).

Generally, under article 67, a claim shall not result in the postponement or stay of the execution of the decision of the administrative decision or administrative action. But the claimant may, however, submit a request that the implementation of the administrative decision be postponed for the duration of the administrative proceedings until there is a legally enforceable Court decision.[94] A request for such a postponement must be stated in the claim on the ground that there is an extreme urgency that the interests of the claimant would be seriously prejudiced if the administrative decision under challenge is implemented.[95] But the request for such a postponement shall not be granted if public interest compels the implementation of the decision.[96]

C. HEARING AT THE APPEAL LEVEL

A decision of the Administrative Court is appealable to the Administrative Appeal Court by both the claimant and the defendant.[97] To file an appeal, the procedure prescribed by Law No. 5 of 1986 has to be followed. Within fourteen days after the Court decision, the appellant shall make a request for leave to appeal and submit it in writing to the Administrative Court which has made the decision.[98] The request for leave to appeal shall be accompanied by

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94 Art. 67(2).

95 Art. 67(4)(a).

96 Art. 67(4)(b).

97 Art. 122.

98 Art. 123(1).

an advance payment of costs, the amount of which is determined by the Clerk.[99] The request shall be registered by the Clerk in the register of cases and the Clerk shall inform the party against whom the appeal is lodged of the request.[1] At the most, 30 days after the request for leave to appeal is registered, the Clerk shall inform both parties that they may see the case file at the office of the Administrative Court 30 days after receiving the information.[2] A copy of the decision, the report of the proceedings and other relevant documents must be sent to the Clerk of the Administrative Appeal Court within 60 days of the request for leave to appeal.[3]

Hearing of the appeal shall be presided by at least three judges.[4] If the Administrative Appeal Court considers that the hearing by the Administrative Court was incomplete, it may hold its own session to hold a supplementary hearing or order the relevant Administrative Court to undertake the supplementary hearing.[5]

The appellant may withdraw his or her request for leave to appeal before the Administrative Court makes a decision on the request and the request

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99 Art. 123(2).

1 Art. 125.

2 Art. 126(1).

3 Art. 126(2).

4 Art. 127(1).

5 Art. 127(2).

could not be resubmitted even though the time period for such a submission has not expired.[6]

Finally, article 130 provides that when a party has accepted the decision of the Administrative Court, he or she could not retract the statement even though the time period for submitting a request for leave has not yet expired.

Under the common law system, appeal against the decision of the High Court on an administrative dispute lies to the Court that has the appellate jurisdiction to hear civil matters. Very often, it is the Court of Appeal. In Australia, section 44(1) of the AAT Act provides that a party to a proceeding before the Tribunal may appeal to the Federal Court of Australia only on the question of law. However, the proceedings are not an appeal in the strict sense because the appeal lies within the original jurisdiction of the Federal Court.[7]

D. HEARING AT THE CASSATION LEVEL

Any further appeal to the Supreme Court is by way of a cassation. Cassation means the jurisdiction of the highest court, beyond which there is no further appeal, to quash any unjust or illegal act or decision. In Indonesia the highest court of appeal is the Supreme Court. As in France, the *Cour de*

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6 Art. 129.

7 Drake v Minister for Immigration and Ethnic Affairs (1979) 2 A.L.D. 60 at 61-62, per Bowen C.J. and Deane J.

Cassation is the highest court of appeal. A request for a cassation to the Supreme Court may be made for a final and the highest level decision.[8] The procedure for the cassation hearing shall be in accordance with the provisions of article 55(1) of Law No. 14 of 1985.[9] According to article 55(1), the cassation is the hearing of disputes exercised by the Appellate Religious Jurisdiction or Administrative Jurisdiction of the Supreme Court.

An application for a cassation could only be made once[10] and the procedures are governed by articles 46 to 53 of Law No. 14 of 1985. According to article 46(1), the application may be oral or in writing and must be made by the parties to the dispute. Nevertheless, the Attorney-General may also make such an application on the ground of public interest.[11]

The application must be made through the Clerk of the first instance that decides the matter within fourteen days after the announcement of the decision to the applicant.[12] Upon the expiry of the fourteen-day period, there can be no application for a cassation hearing because it is presumed that the parties in the disputes have accepted the decision.[13] In Kepala Dinas Perumahan

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8 Art. 131(1).

9 Art. 131(2).

10 Art. 43(2) of Law No. 14 of 1985.

11 Art. 46(1).

12 *Ibid.*

13 Art. 46(2).

Daerah IJ v Ny. M and others,[14] the request for a cassation to the Supreme Court was rejected because the application was made after the lapse of 14 days period.

If there is an application for a cassation, after the payment for the costs of the cassation, the application shall be registered on the same day by the Clerk in the register of cases. The Clerk shall make a cassation application together with other documents in the dispute.[15] At the most, within seven days after the application of the cassation has been registered, the Clerk must inform the defendant in writing of the application.[16] Within fourteen days after the application has been entered in the register of cases, the applicant must submit a summary for a cassation *(memori kasasi)* which states the grounds of application.[17] The Clerk shall signify the acceptance of the summary for a cassation and a copy thereof shall be given to the defendant within 30 days after the acceptance.[18] The defendant then has the right to submit a counter statement to the Clerk within 14 days after receipt.[19]

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14 Supreme Court decision Reg. No. 7K/TUN/1992.

15 Art. 46(3).

16 Art. 46(4).

17 Art. 47(1).

18 Art. 47(2).

19 Art. 47(3).

After receiving the summary for a cassation and counter statement, if any, the Clerk within 30 days, must submit the cassation application, the summary for a cassation, the counter statement and the dispute documents to the Supreme Court.[20] The Clerk of the Supreme Court shall then register the application in the register of cases allotting a number to each application according to the date of acceptance and make a brief statement of its contents and report the matter to the Supreme Court.[21]

The application for a cassation may be withdrawn before the application is heard by the Supreme Court.[22] However, a fresh application on the same matter could not be made even though the time period for submitting an application for a cassation has not expired yet.[23]

After the registration for a cassation, the Supreme Court shall hear the matter based on the documents *(surat-surat)* produced before it without the presence of parties or witnesses in the dispute.[24] Nevertheless, if the Court feels that it is necessary to hear personally the parties or witnesses involved, then they would be called before the Supreme Court; or the Supreme Court may direct the Administrative Court or the Administrative Appeal Court that decided the

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20 Art. 48(1).

21 Art. 48(2).

22 Art. 49(1).

23 *Ibid*.

24 Art. 50(1).

matter earlier to hear the parties or witnesses.[25] If the Supreme Court itself hears the matter and nullifies the decision of the Court below, the Supreme Court will follow the rules of evidence followed by the Court of first instance.[26]

If the Supreme Court accept the cassation application based on the ground that the lower Courts do not have the power or have exceeded the power,[27] the Supreme Court may refer the matter to the other Court that has jurisdiction to hear and decide the matter.[28] But if the Supreme Court accepts the cassation application on the ground that the lower Court has erred in law or has acted contrary to the law; or has been negligent to in applying the conditions imposed by law and the law provides that the negligent act shall nullify the decision made,[29] the Supreme Court itself must decide the matter accordingly.[30]

In making the decision, the Supreme Court is not bound by the grounds submitted by the applicant in the cassation and may use other legal grounds.[31] A copy of the decision shall be given to the Chief of the

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25 *Ibid.*

26 Art. 50(2).

27 Refer to art. 30(a).

28 Art. 51(1).

29 Refer to art. 30(b),(c).

30 Art. 50(2).

31 Art. 52.

Administrative Court (of the first instance) that decided the matter.[32] The parties to the dispute shall be informed of the Supreme Court decision within 30 days after the Chief of the Administrative Court of first instance has received the decision and the dispute documents from the Supreme Court.[33]

Under the common law system, the second stage of appeal is still termed as appeal, but it is made to the higher court. As for example, in England an administrative decision by the Court of Appeal could be appealed against to the House of Lords which hears the appeal in its appellate jurisdiction. In Malaysia, the Federal Court is the apex court of appeal. From the above discussion, the Supreme Court of Indonesia also enjoys appellate jurisdiction through cassation. Its role is similar to that played by the Malaysian Federal Court or the House of Lords of England so far as administrative disputes are concerned. The court's decision could be based not only on the grounds submitted but also on other legal grounds.

E. REVIEW BY THE SUPREME COURT

Only the Court's decision that legally has the force of law may be reviewed by the Supreme Court. The law governing the review process was first introduced in article 15 of Law No. 19 of 1964 which was later replaced by Law No. 14 of 1970.[34] It must be stressed here that this process is distinct and separate from the appellate jurisdiction of the Supreme Court discussed above.

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32 Art. 53(1).

33 Art. 53(2).

34 Art. 21.

According to article 21, parties with interests may apply to the Supreme Court for a review of a Court decision, either civil or criminal, which legally has the force of law. The review procedure is further regulated by Law No. 14 of 1985 in articles 28, 34 and articles 66 to 77.

Article 28(1)(c) provides that the Supreme Court has the jurisdiction to hear and decide an application for a review against the decision of the Court below that legally has the force of law. The principles of review are as follows:

(1) The Supreme Court hears and decides an application for a review in the first and final instance against a court's decision that legally has the force of law.[35]

(2) The application for a review shall only be made once.[36]

(3) The application for review may not postpone or terminate the execution of the Court's decision.[37]

(4) The application of a review may be withdrawn by the applicant before the decision on the review is made and the application may not be resubmitted.[38]

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35 Art. 34.

36 Art. 66(1).

37 Art. 66(2).

38 Art. 66(3).

The procedure regarding the review against a decision within the Administrative Jurisdiction are provided in articles 67-75 of Law No. 14 of 1985.[39] Article 67 provides that an application for review against Administrative Court's decision may only be made on the following grounds:

(a) When a decision is based on a forgery or fraud committed by the defendant after the decision was made, or based on evidence which the judge discovered later that it has been falsified;

(b) When, after the dispute has been decided, there is new evidence which was not available when the matter was first heard;

(c) When the Court makes a decision on a matter which is not claimed or exceeded what has been claimed;

(d) When part of the claim has not been decided by the court without reasons;

(e) When the Court of the same instance makes conflicting decisions on cases involving the same issues; and

(f) when the judge has made a mistake or an error in the decision.

An application for review of the decision must be made by the parties to the dispute, or by his or her heir or representatives.[40] If, during the hearing process, the applicant dies, his or her heir shall continue with the application.[41]

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39 Art. 77(1).

40 Art. 68(1).

41 Art. 68(2).

The time period for the application for a review is 180 days. The time period commences depends on the grounds applied for, which are as follows:

(a) If the ground of application is based on forgery or fraud, the time period starts as from the time the forgery or fraud is made known, or ever since the decision of the civil Judge which has the force of law.[42]

(b) If the ground of application is based on Article 67(b), the time period starts as from the day the new evidence is discovered.[43]

(c) If the grounds of application are based on article 67(c), (d), and (f), the time period starts from the day where there is a decision which has the force of law and the parties to the dispute have been informed.[44]

(d) If the ground is based on article 67(e), the time period starts from the delivery of the final decision and the contradictory decision which has the force of law and the decision has been made known to the parties to the dispute.[45] In making an application for a review, the applicant incurs the costs for the review proceedings.[46]

After the application has been received, the Clerk must, within 14 days, send a copy of the application to the defendant with the following objectives:[47]

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42 Art. 69(a).

43 Art. 69(b).

44 Art. 69(c).

45 Art. 69(d).

46 Art. 70(1).

47 Art. 72(1).

(a) if the application for review is based on the grounds provided in article 67(a) or (b), to give the defendant an opportunity to make a reply; and

(b) if the application for review is based on the ground provided in any of the paras from paras (a) to (f) of article 67, the purpose is to provide information.

The defendant is then given 30 days to make a reply after receiving the copy of the application for a review.[48] The letter of reply shall be sent to the Court of first instance that decides the matter and the Clerk shall certify an acceptance of the letter of reply and a copy of the letter shall be given to the applicant for information.[49]

The Clerk, within 30 days, shall send the application, complete with the dispute documents together with the costs of the proceeding, to the Supreme Court.[50] There is no correspondence between the applicant and the other party (respondent) with the Supreme Court.[51]

The Supreme Court has the power to order the Administrative Courts that heard the dispute during the first instance or during the appeal stage, to hold a supplementary hearing or request for all the evidence and its

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48 Art. 72(2).

49 Art. 72(3).

50 Art. 72(4).

51 Art. 72(5).

considerations.[52] After the execution of the Supreme Court order, the relevant Court shall immediately send a copy of the report of the supplementary hearing together with the considerations referred to in article 73(1) to the Supreme Court.[53] The Supreme Court may:

(1) accept the application for review and nullify the decision reviewed and hold its own hearing and make its own decision on the dispute;[54] or

(2) reject the application for review if the Supreme Court is of the opinion that there is no ground for intervention.[55]

In Dr. Ali Yunasri Siregar v Kepala Kantor Wilayah Department Perdagangan Propinsi Sumatera Utara,[56] the claimant relying on article 132, applied for a reconsideration on the decision of the Administrative Court in Medan dated 22.5.1991. The Administrative Court in its decision had not accepted claimant's claim on the ground that the claim was not based on acceptable grounds as provided in article 62(1)(c). In this case the object of dispute was a memorandum No. 1485/02-/TU/IV/91 dated 2.4.1991 from the defendant to the claimant. The Supreme Court in considering the review application ruled that the decision of the Administrative Court was based on the

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52 Art. 73(1).

53 Art. 73(3).

54 Art. 74(1).

55 Art. 74(2).

56 Supreme Court decision Reg. No. 1 PK/TUN/1991.

article 62(1)(e) and article 55 of Law No. 5 of 1986. The Supreme Court further considered that based on article 62(3) the decision against the dismissal could be objected and according to article 62(6), there is no legal avenue to challenge the decision on the objection. Thus, the Supreme Court held that the application for a review from the claimant could not be entertained.

Lastly, in making a decision, the Supreme Court must give its reasons.[57] The Supreme Court shall then send a copy of the decision on the review to the Administrative Court and within 30 days to the applicant and also to inform the defendant by giving him or her a copy of it.[58]

The review process by the Supreme Court is separate and distinct from the normal process of settling administrative dispute to the Administrative Courts structure as discussed earlier.

F. RECAPITULATION

Under Law No. 5 of 1986, if domestic remedies are available, an administrative dispute must be resolved within the administration first and if there is an appeal against the decision, the matter is brought before the Administrative Appeal Court that acts as court of first instance. The decision of the Administrative Appeal Court may be further subjected to a request for cassation to the Supreme Court. On the other hand, if no domestic remedy is available,

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57 Art. 74(3).

58 Art. 75.

an administrative dispute shall be brought before the Administrative Court which acts as a court of first instance.

The rules of procedure in the Administrative Court consists of material procedure and formal procedure. The formal procedure includes normal procedure and extraordinary procedure. The extraordinary procedure provides for a speedy process in the settlement of an administrative dispute.

A decision of the Administrative Court is subjected to an appeal to the Administrative Appeal Court by both the claimant and the defendant and it must be presided by at least three judges.

Then a further appeal could be made to the Supreme Court by way of cassation. The cassation hearing process is regulated by Law No. 14 of 1985.

Finally, the court's decision that has the force of law may be reviewed by the Supreme Court and the reviewing process is regulated by Law No. 14 of 1970.

IV. IMPLEMENTATION OF THE COURT DECISION

A. General

According to Law No. 5 of 1986 only the Court decision which has received the force of law can be enforced.[59] This refers to the final

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[59] Art. 115.

decision at the end of an administrative proceeding. Prior to the implementation of the Court decision, the Clerk shall, within 14 days from the day the decision is legally enforceable, send a copy thereof to the disputing parties by registered letter by order of the Chairperson of the Court which heard the case at first instance.[60] A party who has a direct interest in the Court decision may also request for an official copy thereof provided he or she bears the cost thereof.[61]

If a claim is upheld, the Court's decision may specify any of the following obligations which must be undertaken by the Administrative body that made the decision:

(a) revocation of the administrative decision under dispute;[62]

(b) revocation of the administrative decision under dispute and the substitution of a new administrative decision;[63]

(c) if the claim is based on the failure of the Administrative Body to make a decision when it is their obligation to do so, the making of an administrative decision;[64]

(d) to pay compensation;[65] or

(e) rehabilitation.[66]

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60 Art. 116(1) and its elucidation.

61 Art. 113(2).

62 Art. 97(9)(a).

63 Art. 97(9)(b).

64 Art. 97(9)(c).

65 Arts. 97(10) and 120.

66 Arts. 97(11) and 121.

In HU v Panitia Penyelesaian Perselisihan Perburuhan Pusat (P4P),[67] the claimant's employment was terminated by P.T. EC1. The dispute of this case was regarding the effective date of termination of the claimant. The matter was brought to the Department of Manpower and the Regional Committee decided that the effective date of termination was 11.2.1989. The claimant made an appeal to the Central Appeal Committee, the defendant, but the Central Appeal Committee upheld the decision of the Regional Committee. The claimant then brought the matter to the Administrative Appeal Court. The Administrative Appeal Court held that the decision of the defendant as invalid and void. In its decision the Administrative Appeal Court ordered the defendant to revoke its decision and make a new order which stated that the termination was effective on 11.2.1989. Still not satisfied, the claimant made a further request for cassation to the Supreme Court. The Supreme Court rejected the application of cassation by the claimant and improved the decision of the Administrative Appeal Court, *inter alia*, by ordering the defendant to revoke its decision and make a new decision on the effective date of termination of the employment contract. The important principle emerged therefrom is that the Administrative Appeal Court only has the power to order the administrative body to make a new decision and the content of the new decision must be decided by the administrative body concern, not the Administrative Appeal Court.

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67 Reg. No. 4K/TUN/1992.

B. Failure to implement the Court decision

1. Failure to implement Court decision with reasons

Where an obligation is imposed under article 97(11) regarding public service dispute and the defendant is unable or only partially able to implement a legally enforceable Court decision because of a change in the circumstances after the decision has been made, he or she is obliged to report the matter to the Chairperson of the Administrative Court of first instance that heard the dispute and also the claimant.[68] Within 30 days after receiving such a notice, the claimant may submit a request to the same court that the defendant be obliged to pay a sum of money or other compensation he or she requested.[69] The Chairperson of the Administrative Court, after receiving such a request, shall order that the disputing parties be summoned before it in an attempt to consider the request, and that the disputing parties agree as to the amount of money or other compensation which the defendant must pay.[70] If all attempts made to reach the agreement referred to fail, the Chairperson of the Court shall determine the sum of money or compensation in a declaration accompanied by an adequate evaluation.[71] The declaration may be submitted to the Supreme

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68 Art. 117(1).

69 Art. 117(2).

70 Art. 117(3).

71 Art. 117(4).

Court for redetermination by either the claimant or the defendant[72] and the parties must abide by the decision of the Supreme Court.[73]

2. Failure to implement the Court decision without reason

If the Court ordered the defendant to perform an obligation under article 97(9)(b) and (c), and those obligations have not been performed within the period of three months of the order, the claimant may submit a request to the Chairperson of the Court who heard the case at first instance that the Court order the defendant to implement the Court decision.[74] However, the three months period is not mandatory because the Chairperson of the Court may use his discretion to determine the period before ordering the defendant to implement the obligations.[75]

If the defendant's failure to implement the Court decision persists, the Chairperson of the Court shall bring the matter to the notice of the defendant's superior authority.[76] The superior authority shall, within two months of receiving such notice, instruct the relevant official to implement the Court's decision.[77] If the superior authority ignores its obligation, the

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72 Art. 117(5).

73 Art. 117(6).

74 Art. 116(3).

75 Elucidation of art. 116(3).

76 Art. 116(4).

77 Art. 116(5).

Chairperson of the Court shall appeal to the President of Indonesia to order the relevant official to carry out the Court decision.[78] It must be observed that article 116 seems to give the impression that the order of the Administrative Court lacks sanctity.

C. Challenging the implementation of the Court decision

A third party who has not participated in a dispute proceeding under article 83 and who is concerned that his or her interests might be injured by the implementation of a legally enforceable decision, may lodge a challenge to the implementation of the decision at the Court which heard the case at first instance.[79] The objection to the implementation of the Court decision nevertheless does not automatically result in a stay of the implementation of the decision.[80] This means that the decision is valid unless the challenge succeeds.

D. Supervision of the implementation of a legally enforceable decision

According to article 119, the Chairperson of the Court[81] is responsible for the supervision of the implementation of the legally enforceable decision.

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78 Art. 116(6).

79 Art. 118(1). Article 83 provides that a third party who has an interest may intervene in an administrative proceeding.

80 Art. 118(3).

81 Whichever Administrative Court that decide the matter.

V. THE ROLE OF ADMINISTRATIVE BODY IN AN ADMINISTRATIVE DISPUTE

Under the System of Administrative Courts in Indonesia, the Administrative Body Official has several roles. First, according to article 1:6 of Law No. 5 of 1956, "the defendant is the Administrative Body or Official who hands down a decision..." Thus in an administrative dispute, the Administrative body or Official can only be a defendant. Secondly, based on article 83 of the same Law, if an Administrative Body or Official has an interest in a dispute, it may participate in the dispute as an intervener that defends its interests. Thirdly, an Administrative body may also become a representative in an administrative dispute. As for example, based on Law No. 5 of 1991 (law regarding Attorney General), an attorney may represent the government in civil and administrative disputes.[82] Lastly, the Administrative body or Official can be called as a witness in an administrative dispute. If the Administrative Body or Official is made as a witness, it must attend the hearing personally,[83] failing which, the Judge may order that the Administrative body or official be escorted to the hearing by the police.[84] If the evidence is confidential in nature, the claim of confidentiality by the government shall be evaluated and decided by the Judge.[85] If an administrative body purposely withhold a government document with the intention that the claimant may not have an access to it, the judge may order an

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82 Hadjon, Philipus M, *et al.* Pengantar Hukum Administrasi Indonesia (Yogykarta: Gadjah Mada University Press, 1994), p. 376.

83 Art. 93.

84 Art. 86(2).

85 Art. 89(2).

investigation into the matter.[86] The judge may also order that the relevant document be shown to the Court at a special sitting convened for that purpose.[87]

In England, until 1968, the Court may refuse to reveal certain documents on the ground of Crown privilege. This was clearly laid down in Duncan v Cammell, Laird and Co.[88] Nevertheless, the case was overruled in Conway v Rimmer.[89] In this case the House of Lords held that when a Minister claimed that certain documents ought to be withheld, the proper test was whether the withholding of documents of that particular class was really necessary for the functioning of the public service. The court could examine the documents without their being shown to the parties and decide whether or not the Minister's claim was justified. If on the balance, the court considers that the documents should probably be produced, it should generally examine the documents before ordering the production. This principle has also been applied in Australia,[90] India,[91] and Malaysia.[92]

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86 Art. 85(1).

87 Art. 85(2).

88 [1942] A.C. 624.

89 [1968] A.C. 910.

90 Robinson v South Australia [1913] AC 704.

91 State of Punjab v Sodhi Sukdev Singh AIR 1961 SC 493.

92 B.A. Rao and Ors v Sapuran Kaur and Anor [1978] 2 MLJ 146.

Hence, under both systems, i.e., Indonesian and the common law systems, the court is competent to order the production of a particular document in court and whether the disclosure of the documents might affect public interest or not would be decided by the court.

As a conclusion, in Indonesia an Administrative Body or Official may act as a defendant or an independent intervener that defends its interest or as a representative or as a witness in an administrative dispute.

CHAPTER VII

REMAINING PROVISIONS

CHAPTER VII

THE REMAINING PROVISIONS

I. OTHER PROVISIONS

The following discussions will be confined to the remaining provisions of the Act.

Chapter V of Law No. 5 of 1986 makes provisions for the general duties and powers of the Chairperson of the Administrative Court, Clerk of the Court, Deputy Clerk, Junior Clerk and Relief Clerk. According to Article 133, the Chairperson of the Court is responsible to control the division of duties between the Judges. He also allocates all case files and other documents that are relevant to the matters under dispute.[1] If in an Administrative dispute the court requires special expertise, the Chairperson of the Court may appoint an Ad Hoc Judge as a member of the bench.[2] To be appointed as an Ad Hoc Judge, a person must fulfil the following conditions:[3]

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1 Art. 134.

2 Art. 135(1).

3 Art. 135(2) and art. 14(1) except 14(1)(e), (f).

a) an Indonesian citizen;

b) devoted to the belief in one Almighty;

c) faithful to the Pancasila and the Constitution of 1945;

d) not be a former member of the banned Indonesian Communist Party or any of its mass organisations and not be a person who was directly or indirectly involved in the Indonesian Communist Party's Counter Revolutionary Movement of 30th September (G.30.S/PK1) or any of its other prohibited organisations;

f) at least twenty five years of age; and

g) responsible, honest, just and not of culpable character.

A person who is appointed as Ad Hoc Judge is not prohibited to serve as an entrepreneur,[4] but is prohibited from being a bailiff of the court or guardian, *loco parentis* or official involved in the case being heard by him.[5] The manner of appointment of the Ad Hoc Judge to the Court shall be governed by Government Regulations.[6]

Besides appointing an Ad Hoc Judge, the Chairperson of the Court shall also determine in chronological order which cases must be heard and decided; but if public interest is involved in a particular case and it must be heard

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4 A person who organizes a commercial enterprise; person who works under contract as an intermediary in the business affairs of others.

5 Art. 135(3).

6 Art. 135(4).

immediately, the Chairperson may order that the hearing of that case be given priority.[7]

Article 137 provides that the Clerk of the Court is responsible for undertaking the administration of cases and supervises the duties of the Deputy Clerk, Junior Clerk and Relief Clerk. Article 138 further provides that the Clerk, Deputy Clerk and the Relief Clerk are responsible to assist the Judge by taking notes and recording the proceedings of the Court sessions.

Article 139 states that the Clerk is obliged to compile a register of all cases which are received by the secretariat, and in the register of cases, each case is allocated a consecutive number and a summary of its contents. Besides, the Clerk is also under a duty to make a copy of the Court decision in accordance with the applicable legal provisions.[8]

Other responsibilities of the Clerk are provided by article 141. According to article 141(1), the Clerk is responsible for the management of case files, decisions, documents, official documents, register, case fees, third party deposits, valuable documents, evidence and other documents held by the secretariat. No registers, notes, minutes, reports of proceedings and case files may be removed from the secretariat office except with the permission of the

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7 Art. 136.

8 Art. 140.

Chairperson of the Court or under provisions of the law.[9] The prohibition against removal includes all ways and manners to transfer the contents of the registers, notes, minutes, reports of proceedings and case files from the secretariat office, which includes the office of Deputy Clerk, Junior Clerk, Relief Clerk.[10]

Chapter VI deals with matters pertaining to the transitional period when Law No. 5 of 1986 came into force. During the transitional period, if the Administrative disputes are in the process of being heard by a Court of general jurisdiction at the time of the formation of the Courts under Law No. 5 of 1986, the disputes shall continue to be heard and decided by that General Court.[11] "Administrative disputes" in Article 141(1) are civil disputes that have been registered at the District Court as a case of unlawful act *(perbuatan melanggar hukum, onrechtmatige overheidsdaad)*.[12] The case of unlawful act may be registered as a case with several other claims and one of the main claims is regarding the validity of an Administrative Decision of an Administrative Body according to Article 1:3 of Law No. 5 of 1986; or the case has been registered

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9 Art. 141(2).

10 Elucidation of art. 141(2).

11 Art. 142(1).

12 Rule 1 Circular No. 1 of 1991 regarding Guidelines on the Transitional Provision of Law No. 5 of 1986.

as a case of an unlawful act and the nature of the claim is on the validity of an Administrative Decision by an Administrative Body.[13]

However, if the Administrative disputes have already been submitted to a Court of general jurisdiction but which have not yet been heard at the moment of the formation of the Administrative Courts under Law No. 5 of 1986, the matters shall be transferred to the Administrative Courts.[14] According to rule 4 of Circular No. 1 of 1991, this provision means that the case of unlawful act has been registered and the number of the case has been given but at the most the case has been given to the relevant Judge and the date of the first hearing has been fixed and may be the parties have been called but not yet appeared before the court for the first proceeding. Due to a time lapse of seven years since its implementation in 1991, it must be said that these transitional provisions are now of mere academic interest only.

Under Law No. 5 of 1986, the Minister for Justice is responsible for the appointment of the Chairpersons, Deputy Chairpersons, Judges, Clerks, Deputy Clerks, Junior Clerks, Relief Clerks and Deputy Secretary in all Courts of Administrative Justice. However, in carrying out that responsibility, the Minister shall take into account the opinion of the Chairperson of the Supreme Court.[15] For the creation of Administrative Courts in each regency[16] and each

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13 *Ibid.*

14 Art. 142(2).

15 Art. 143.

16 District level II.

capital city so as to ensure that the citizens are given the necessary protection of the Administrative Jurisdiction,[17] the Minister of Justice, guided by the views of the Chairperson of the Supreme Court, shall take all the necessary action required.

Chapter VII contains the concluding provisions of Law No. 5 of 1986. Article 145 provides that the Law shall commence operation on the date of enactment and its implementation shall be governed by Government Regulations within five years of the enactment of this Law. It is also provided that in order to ensure that every person is informed of this Law, it shall be published in the Official Gazette of the Republic of Indonesia. Since this system is a new system, its implementation needs careful planning and preparation on the part of the Government, and legal instruments would have to be promulgated. Its implementation needs to be carried out gradually by taking all the necessary steps. To accommodate and meet such a situation, it is necessary to give an allowance of five years from the date of the enactment of this Law for the Government to do the needful including making the necessary regulations.[18]

Article 145 and its elucidation explains why the System of Administrative Courts in Indonesia could not be implemented immediately. To reiterate, the implementation of the system is primarily regulated by Law No. 5

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17 Elucidation of art. 143.

18 Elucidation of art. 145.

of 1986 and the Government Regulations. Thus, to comprehend the mechanism of the System of Administrative Courts in Indonesia it is important for one to make a careful and thorough study of the relevant Act and the regulations made thereunder. The relevant Government Regulations are as follows (some of which have already been mentioned earlier):

1. Law No. 10 of 1990 regarding the establishment of the Administrative Appeal Court of Jakarta, Medan, and Ujung Pandang *(Undang-undang No. 10 Tahun 1990 tentang Pembentukan Pengadilan Tinggi Tata Usaha Negara Jakarta, Medan, dan Ujung Pandang).*
2. President Decree No. 52 of 1990 regarding the establishment of Administrative Courts of Jakarta, Medan, Palembang, Surabaya, and Ujung Pandan *(Kepress No. 52 Tahun 1990 tentang Pembentukan Pengadilan TUN di Jakarta, Medan, Palembang, Surabaya, dan Ujung Pandang).*
3. Government Regulation No. 7 of 1991 regarding the implementation of Law No. 5 of 1986 on Administrative Courts. *(Peraturan Pemerintahan No. 7 Tahun 1991 tentang Penerapan Undang-undang No. 5 Tahun 1986 tentang Peradilan Tata Usaha Negara).*
4. Government Regulation No. 26 of 1991 regarding the Dismissal with honour, Dismissal without honour, and Temporary Dismissal and Rights of a Supreme Judge and a Judge whose services are terminated *(Peraturan Pemerintahan No. 26 Tahun 1991 tentang Tatacara Pemberhentian Dengan Hormat, Pemberhentian Tidak Dengan Hormat, dan Pemberhentian Sementara Hak-hak Hakim Agung dan Hakim yang Dikenakan Pemberhentian).*

5. Government Regulation No. 43 of 1991 regarding the payment of Damages and the Procedure of its implementation in the Administrative Courts *(Peraturan Pemerintah No. 43 Tahun 1991 tentang Ganti Rugi dan Tata Cara Pelaksanaannya pada Peradilan Tata Usaha Negara)*.
6. The Circular of the Finance Minister of the Republic of Indonesia No. 1129/KMK.01/1991 regarding the Procedure on the Payment of Damages in the Implementation of the decision of the Administrative Courts *(Keputusan Menteri Keuangan RI No. 1129/KMK. 01/1991 tentang Tata Cara Pembayaran Gantirugi Pelaksanaan Putusan Pengadilan Tata Usaha Negara)*.
7. Presidential Decree No. 16 of 1992 regarding the establishment of Administrative Courts in Bandung, Semarang, and Padang *(Keputusan Presiden No. 16 of 1992 tentang Pembentukan Pengadilan Tata Usaha Negara di Bandung, Semarang, dan Padang)*.
8. Presidential Decree No. 41 of 1992 regarding the establishment of the Administrative Courts in Pontianak, Banjarmasin, and Manado *(Keputusan Presiden No. 41 Tahun 1992 tentang Pembentukan Pengadilan Tata Usaha Negara di Pontianak, Banjarmasin, dan Manado)*.

Other than the Government Regulations, the Supreme Court has issued circulars[19] which provide guidelines on the implementation of Law No. 5 of 1986. The issuance of these circulars is to ensure the smooth

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19 A circular is not legally binding however it is normally followed as a guidelines.

implementation of the system of Administrative Courts by the Judges. Reference may be made to some of them:

1. Circular No. 1 of 1991 regarding Guidelines on the implementation of the Transitional Provision of Law No. 5 of 1986 *(Surat Edaran No. 1 Tahun 1991 Tentang Petunjuk Pelaksanaan Ketentuan Peralihan Undang-undang Nomor 5 Tahun 1986).*
2. Circular No. 2 of 1992 regarding Guidelines on certain provisions[20] in Law No. 5 of 1986 pertaining to the Administrative Courts *(Surat Edaran No. 2 Tahun 1992 Tentang Petunjuk Pelaksanaan Beberapa Ketentuan Dalam Undang-undang No. 5 Tahun 1986 Tentang Peadilan Tata Usaha Negara).*
3. The Supreme Court Circular No. 1 of 1993 Regarding the Right of Material Test *(Peraturan Mahkamah Agung No. 1 Tahun 1993 Tentang Hak uji Materiil).*

II. OUT OF COURT SETTLEMENTS

Parties to an administrative dispute may make an out of court settlement. Once this is done, the claimant must withdraw the claim officially in the open court and must state the reasons for so doing. If the withdrawal is upheld, the Court will order the Clerk to record the settlement in the register of cases. The order must be read out in the open court.[21]

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20 Dealing with matters such as limitation period, preliminary examination, settlement, etc.

21 Part VIII of Circular No. 2 of 1992.

CHAPTER VIII

INDEPENDENCE OF THE ADMINISTRATIVE COURTS IN INDONESIA

CHAPTER VIII

INDEPENDENCE OF THE ADMINISTRATIVE COURTS IN INDONESIA

Since the main purpose of establishing Administrative Courts in Indonesia is to provide legal protection for the citizens against the government or its administrative action, it is important to ensure that the institution is independent of executive interference. In Indonesia, the Judges, inclusive of the Administrative Court Judges, are civil servants. Being civil servants, the question is how independent they are in settling administrative disputes between the government and the citizens. How independent the Administrative Courts are in Indonesia can be known by examining Law No. 5 of 1986.

According to article 13, being civil servants, the appointment and general supervision of the Administrative Court Judges come under the responsibility of the Minister of Justice. However, the article further states that though the appointment and general supervision of the Judges are the responsibility of the Minister of Justice, the Judges are independent in investigating and deciding administrative disputes. Article 16(1) then provides that the appointment of the Judges of Administrative Court is by the President of the Republic as Head of State on the advice of the Minister of Justice, with the

assent of the Chief Justice of the Supreme Court. The appointment of the Chairperson and Deputy Chairperson of the Administrative Court is made by the Minister for Justice, with the assent of the Chief Justice of the Supreme Court.[1]

Article 19 further provides that a Chairperson, Deputy Chairperson and Judge may only be dismissed from office with honour:

(a) at their own request; or

(b) persistent physical or emotional illness; or

(c) they reach the age of sixty years for a Chairperson, Deputy Chairperson and Judge of the Administrative Court, and sixty three years for a Chairperson, Deputy Chairperson and Judge of the Administrative Appeal Court respectively; or

(d) an obvious inability to continue with their duties.

Article 20 provides that the Chairperson, Deputy Chairperson and Judge of the Administrative Court, could not be removed from office without honour except on the following grounds:

(a) they have been found guilty of a criminal action; or

(b) they have committed a culpable act; or

(c) they have repeatedly neglected their responsibilities in the course of carrying out their duties;

(d) they have violated their oath or affirmation of office; or

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1 Art. 16(2).

(e) they have violated the prohibition contained in article 18, i.e., they cannot serve as a bailiff of the court, guardian, *loco parentis* or official involved in a case being heard by them, an entrepreneur and as legal adviser.

Except on the ground mentioned in para (a), an inquiry into the possibility of dismissal would only be held after the person concerned has been given the opportunity to defend himself or herself before the Judicial Honour Council and the self-defence procedure shall be formulated by the Chief Justice of the Supreme Court.

The Administrative Court Judges may be suspended prior to dishonourable dismissal by the President on the advice of the Minister of Justice with the assent of the Chief Justice of the Supreme Court.[2] However, before the suspension, the judges concerned shall be given the opportunity to defend himself or herself.[3]

Article 24 provides that matters pertaining to the procedure of dismissal with honour, dismissal without honour, temporary suspension and rights of officials facing discharge shall be regulated by the Government Regulations.

If an arrest or detention has to be made against an Administrative Court Judge, it is only possible to do so with the order of the Attorney General

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2 Art. 22(1).

3 Art. 22(2).

with the assent of the Supreme Court and the Minister of Justice.[4] But for being caught in the act of committing a criminal act punishable with death penalty or being suspected of having committed a crime threatening national security, a judge may be arrested without the order of the Attorney General but with the assent of the Chairperson of the Supreme Court or Minister of Justice.[5]

Further, article 25 provides that the status of the Judicial protocol, position and allowances of the Administrative Court Judges shall be regulated by Presidential determinations.

Besides statutory provisions, there is case law to provide some indication of how independent the Administrative Courts may be in Indonesia. The case referred to is Goenawan Mohamad Pem-Red. Majalah Berita Minggu TEMPO v Information Minister of the Republic of Indonesia.[6] In this case, the licence of the magazine, TEMPO, was revoked by the Minister of Information. The Administrative Court of Jakarta held that the decision to revoke the licence was invalid because the decision was made arbitrarily and it conflicted with the legislation in force, as provided in article 53(2)(a) and (c). The Minister was ordered to revoke his decision and issue a licence to allow the publisher of the magazine to continue with its operation. The decision of the Administrative Court was upheld by the Administrative Appeal Court. Even though the decision

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4 Art. 26(1).

5 Art. 26(2).

6 Administrative Court decision No. 094/1994/IJ/PTUN-JKT.

of the Administrative Appeal Court was reversed by the Supreme Court recently,[7] the important point to note here is that regardless of the fact that a Minister is a powerful and influential political leader of the ruling party, the Administrative Court would not hesitate to carry out its duty if in its view an administrative decision conflicts with the legislation in force.

Apart from the case above, the provisions of articles 13, 16, 19, 20, 22, 24, 25 and 26 nevertheless show that the government still plays an important role in the appointment and general supervision of the Administrative Court Judge. Hence, to guarantee the independence of the Administrative Courts in Indonesia, it is best that the general supervision, management, salary and allowances of the Administrative Court Judges be put under the responsibility of a body independent of the government. In this context, a look at the French system would be useful. In the French system, even though the members of the Administrative Courts are civil servants, their independence is guaranteed. This is because Law 6 January 1986 provides that members of the *Tribunaux Administratif* are irremovable; they cannot be transferred to a new post, without their consent, even by way of promotion.[8] Later, when a new appellate jurisdiction was created by Law 31 December 1987, the members of both the

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7 Telephone interview with Mr. Himawan, Law Lecturer of the University of Airlangga, Surabaya, Indonesia on 2nd July 1997.

8 Brown, L. Neville *et al.* French Administrative Law. (Oxford: Claredon Press, 1993) p. 84.

Tribunaux Administratifs[9] and *Cours Administratives d'Appel*[10] become a single body under the management of the Secretary-General of the *Counseil d'Etat*,[11] not under the Minister of Interior. The Secretary-General sits on the *Conseil Superieur*[12] and has powers among others, to be consulted upon all matters affecting the status of the members of the lower courts, i.e., *Tribunax Administratifs* and *Cours Administratives d'Appel* and also acts as disciplinary body for such members. Besides being secretariat for the Council, he is responsible for the management of the lower courts in organising their registries, staff training, and funding; undertakes for the Council studies of the functioning and procedure of the lower courts.[13] Ever since 1989, with the assistance from the Ministry of Interior, he prepares budget for these courts which is then incorporated as a separate chapter in the fiscal estimates of the Ministry of Justice which are consolidated into the draft finance bill for presentation each year to Parliament.[14] Thus, with such safeguards to guarantee its independence and due to convention, the Administrative Courts in France have succeeded in providing a judicial control on the executive and they are impartial in their judgement.

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9 Administrative Court of first instance.

10 Administrative Appeal Court with appellate jurisdiction.

11 Secretariat of the *Counseil d'Etat* is also responsible for the judicial administration of the lower courts.

12 This Council is presided over by the vice-president of the *Conseil d'Etat* and consists of twelve members: they include three representatives of the administration (including the director-general civil service), five election representatives from members of the *Tribunaux* and *Cours, Conseillar d'Etat* in charge of the permanent commission of inspection of the lower courts.

13 Brown, *loc. cit.*

14 *Ibid.*

CHAPTER IX

IMPLEMENTATION PROBLEMS

CHAPTER IX

IMPLEMENTATION PROBLEMS

Since the System of Administrative Courts in Indonesia is a recent creation of the legislature, administrative lawyers would be particularly interested in the application and implementation thereof, the administrative law principles involved and the meanings of the terms used in the main statute (Law No. 5 of 1986) that regulates the working of the system. Needless to say, many implementation problems have arisen since 1991. Some of them will be discussed in this chapter.

I. ADMINISTRATIVE DECISION

Under the new system, the vital requirement under Law No. 5 of 1986 is that the object of the dispute is an administrative decision made by an Administrative Body or Official. The term "Administrative Decision" has been discussed in Chapter IV. The next important issue that needs consideration is who is an Administrative Body or Official. According to Article 1:2:

> "An Administrative Body or Official is a body or official which implements the affairs of government on the basis of the law in force."

However, questions may be asked with regards to the above definition - to what extent can an activity may be said to be "the affairs of the government" and who is responsible to implement it?[1] Indroharto[2] is of the view that to determine what and who is an Administrative Body or Official, the test to be used is to look at the function of the Administrative Body or Official at the time an administrative action is implemented. If at that particular time, the action, based as it is on a law in force, is an action that implements government affairs, whoever executes that function at that moment is presumed to be an Administrative Body or Official.

With regards to the above discussion, one may wonder whether *Pejabat Pembuat Akta Tanah* (hereinafter referred to as "PPAT"), an Office that prepares deeds of sale and purchase on land transactions, is an Administrative Body or Official and whether a deed prepared by them is an Administrative Decision.

PPAT is an official body that is authorised to prepare deeds regarding transfers of rights in land, to confer new rights in land, to allow mortgages or loans by using land as a security. The deed prepared by the PPAT is used as authentic evidence regarding the relevant transactions. With the deed

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1 Lolutong, Paulus Effendie. "Pengertian Pejabat Tata Usaha Negara dikaitkan dengan fungsi PPAT menurut Peraturan Pemerintah Nombor 10 Tahun 1961", Seminar on "Keberadaan dan Kedudukan Pejabat Umum Dalam Tatanan Hukum Nasional", Law Faculty University of Airlangga, Surabaya, 1st June 1996, p. 6.

2 *Ibid.*

a land transaction could be registered with the Land Registry. The formation and functions of the PPAT is regulated by Government Regulation No. 10 of 1961 and its implementation is regulated by several other regulations, i.e., Minister of Land Regulation No. 10 of 1961; Minister of Agriculture and Land Circular dated 21 April 1962 No. Unda 1/2/8; Minister of Home Affairs Circular No. SK 19/DDA/1971.[3]

Though the above provisions show that the PPAT is given the duty to carry out government affairs regarding the registration of land transactions, the crucial issue here is whether the product of the PPAT, i.e., the deed of sale and purchase prepared by the PPAT is an administrative decision. There are several opinions given on this issue. Philipus[4] is of the opinion that the Sale and Purchase Deed prepared by the PPAT is not a written determination as provided by Article 1:3 of Law No. 5 of 1986 because, according to him, the written determination in Article 1:3 is a determination on the decision made by the Administrative Body. But a deed is used as an evidence to bind parties in an agreement. In this context, the deed is a civil law and not a public law matter.

Paulus, too, shares the same view that a deed prepared by the PPAT is not an administrative action or decision. In his view,[5] the Sale and

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3 Hadjon, Philipus M. "Akta PPAT bukan keputusan Tata Usaha Negara", Seminar on "Keberadaan dan Kedudukan Pejabat Umum Dalam Tatanan Hukum Nasional", Law Faculty University Airlangga, Surabaya, 1st June 1996, p. 1.

4 *Id.*, p. 4.

5 Lolutong, *op.cit.*, p. 17-20.

Purchase Deed on Land transactions prepared by the PPAT is not an administrative decision but it is an agreement that binds both parties. If there is any breach of the agreement, the Official could not order the parties to execute the agreement.

Such technical problems highlighted above do not exist in the common law system because under the common law, there is no general statute that regulates administrative disputes. All administrative disputes under the common law system fall under the jurisdiction of the civil court. In Australia, there are general statutes governing administrative disputes, i.e., the AAT and ADJR. However, problems pertaining to the interpretation of the term "administrative decision" have already been settled. The term "administrative decision" is well defined in both statutes. Besides, there is case law thereon.

Reverting to the Indonesian Law No. 5 of 1986, it must be said that the lack of illustration or definition regarding the term "government affairs" to determine whether an action or decision is an administrative decision or action made by the Administrative Body or Official should not be taken to mean that the system of Administrative Courts in Indonesia is defective. Cases are bound to be brought before and decided by the Supreme Court. Hopefully, given some time, a body of case law to be accumulated coupled with administrative circulars will further explain and clarify the provisions in articles 1:2 and 1:3.

II. IMPLEMENTATION OF THE PROVISIONS OF LAW NO. 5 OF 1986

A. Article 48

With the enforcement of Law No. 9 of 1994, problems arise in the implementation of Article 48. According to this article, if an administrative body or official is given the authority to settle disputes through administrative review processes, then such disputes must be resolved through the existing avenues of administrative review. It also provides that Administrative Appeal Court has the duty and authority to hear, decide and settle at first instance administrative disputes falling under article 48. The elucidation of Article 48 further gives examples of the adminsitrative review processes, among others, *Majelis Pertimbangan Pajak* (hereinafter referred to as "MPP"), a Tax Tribunal. From the elucidation of Article 48, it appears that an appeal against the decision of MPP could be brought before the Administrative Appeal Court in its capacity as court of first instance.

Nevertheless, with the enforcement of Law No. 9 of 1994, there is a theoretical problem regarding the status of MPP. According to this law, prior to the formation of a special court, an appeal against the decision of an objection on tax dispute could be made to the MPP. It further provides that the decision of the MPP is not an administrative decision and it is final and conclusive. Thus, it seems that this provision conflicts with Article 48.

Since the problem involved some technical interpretation of the legislation in force, it is imperative to refer to the discussion made by Philipus

who did an in depth study on this issue.[6] He divided his analysis into two parts:

1. Whether MPP is a special court as provided by Law No. 9 of 1994?
2. Whether MPP is an administrative appeal as provided by Law No. 5 of 1986?

On the issue of whether MPP is a special court, Philipus first made an historical analysis on the formation of MPP. This body was originally set up based on *Staatslab* 1915 and was later improved by *Staatlab* 1927. According to him, under *Staatlab* 1927 No. 20 and No. 136, there was no clear provision which mentioned that the body is a special court. These statutes too, did not regulate matters pertaining to the absolute competency of the body. Thus, it was not clear as to what type of appeal could be made to this body, and whether questions of facts or law or both could be referred thereto. He also mentioned that the statutes stated that the proceeding within this body is not open to public. This weakens the point of the MPP being a special court because the general character of a court is that it is open to the public except in exceptional cases. Based on these reasons, Philipus therefore argues that it is hard to exactly determine whether MPP is a special court.

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6 Hadjon, "Peradilan Pajak di Indonesia dewasa ini. Kontroversi yuridis eksistensi Majelis Pertimbangan Pajak", "Seminar Nasional Penegakan Hukum Pajak (Pengadilan Pajak) dan Keadilan Pembahagian Beban Pajak", Law Faculty University Diponegoro, Semarang, 25.9.1995.

He also referred to a thesis presented or advanced by Rochmat Soemitro regarding the MPP. In his thesis Rochmat mentioned that tax disputes that had been decided by the MPP could not be brought before the court of second level or higher court for cassation. Since the decision of MPP could not be brought to the Supreme Court for a cassation, therefore, MPP is not a special court.

Further discussions were made regarding the finality clause governing the decision of the Tax Court, at the moment it refers to MPP. It was argued that if the decision of MPP is final and could not be appealed against even at the cassation level, then it might conflict with Article 24 of 1945 Constitution which provides that there is only one Supreme Court.[7] This principle is further illustrated in Article 10(2),(3), (4) of Law No 14 of 1970. According to Article 10:

> "(2) The Supreme Court is the Highest Court of the State.
>
> (3) There can be a request for a cassation to the Supreme Court against the decisions of the court from the final level other than the Supreme Court.
>
> (4) The Supreme Court executes the highest level of supervision against decisions of other courts in accordance with law."

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[7] It must be noted there is only one Supreme Court. This court may sit at different venues.

The next issue that is taken into account by Philipus was whether MPP was an Administrative Appeal Body. He referred to the elucidation of Article 48 which stated that the elements of administrative appeal were:

1. The procedure is implemented within the administration.
2. It must not be the body that had made the administrative decision under dispute.

By looking at the structure of the MPP, he was of the opinion that MPP failed to fulfil the first element. This was because the MPP is not part of the Finance Department or Tax General Director.

Though the above discussions are leading more to the view that MPP is not an Administrative Appeal Body, yet the decision of the Supreme Court in Majelis Pertimbangan Pajak and another v PT. Standard Stamping[8] stated that the MPP's decision is within the Administrative Appeal. In this case the claimant had objected to the second defendant against a decision made by the Head Officer of Tax Services Jakarta II *(Kepala Kantor Pelayanan Pajak Jakarta II)*. His objection was rejected. The claimant then made an appeal to the first defendant (MPP). Based on decision No. Kep. 5/MPP.1992, the first defendant 38/PPh.Ps.23/90 rejected the claimant's appeal on the ground that MPP has no jurisdiction to reduce or abolish administrative sanction. The claimant then brought the matter to the Administrative Appeal Court and requested for the following orders:

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[8] No. 32K/TUN/1993.

1. To accept and uphold claimant's claims.

2. To declare that the first and the second defendants had acted arbitrarily.

3. To invalidate the decision No.Kep.5/MPP/1992 made by 38/PPh.Ps.23/90 the first defendant.

4. To order the MPP to make a new decision regarding the application of the appeal by the claimant and directed the second defendant to abolish or reduce the sanction on the interest based on Article 13(2) of Law No. 5 of 1983.

5. Order the second defendant to make a decision that abolished or reduced sanction of interest based on Article 13(2) of Law No. 6 of 1983 in decision No. 0006/SKP/23.014/85 and to restitute interest paid for the amount Rp. 5,777,929.87.

6. Order the first and second defendants to pay costs of the proceedings.

The first defendant challenged the competency of the Administrative Appeal Court to hear the matter *(eksepsi)* on the ground that by virtue of Articles 1:1, 1:2 and 1:6 of Law No. 5 of 1986, the defendant was not an Administrative Body or Official but just a Tax Tribunal based on *Staatlab* 1927, Law No. 5 of 1959, Article 27 of Law No. 6 of 1983, Article 17 of Law No. 12 of 1985 which specialised in tax disputes at an appeal stage which is independent, and final in nature and no request for cassation could be made (based on a Supreme Court decision Reg. No. 01/RUP-/PDT/1986). Thus, the Administrative Appeal Court has no jurisdiction over the first defendant.

The above argument was rejected by the Administrative Appeal Court and it held that it has the jurisdiction to hear and dispose of the matter as

a court of first instance. The defendants then applied for a cassation to the Supreme Court against the decision of the Administrative Appeal Court on the following grounds:

1. The Administrative Appeal Court had erred in law in claiming that it is competent to hear the matter because the MPP is not an Administrative Body. The defendant argued that before and after the enforcement of Law No. 5 of 1986, MPP is not an Administrative Body. Even from the legal aspect or the structure of the Judiciary, the MPP is not an Administrative Body. The defendant claimed that the MPP is a special administrative court that has the competency to settle administrative disputes *(sengketa Tata Usaha Negara)*.

2. The Administrative Appeal Court had erred in law in its decision by saying it has competency to hear and settle claims against the decision of the MPP. This was because the object under dispute was not an administrative decision by virtue of Article 48 of Law No. 5 of 1986, but that decision was a decision on taxation.

In its decision, the Supreme Court considered the following:

1. By virtue of Article 10 of Law No. 14 of 1970, the Judicial Jurisdiction was implemented by the General Courts, Religious Courts, Military Courts and Administrative Courts. Other than those courts mentioned, except in matters pertaining to Arbitration as provided by Article 3(1) of the law, there were no other courts.

2. According to the elucidation of Article 48 of Law No. 5 of 1986, the decision of the MPP was an administrative appeal decision. Thus, the decision of the MPP may be brought before the Administrative Appeal Court by virtue of Article 48 and Article 51(3).

Based on the above reasoning, the Supreme Court held that it was proper to bring the matter before the Administrative Appeal Court as the court of first instance. Thus, there was no error of law in the matter and the request for cassation was rejected.

Philipus made some comments on the decision of the Supreme Court in the above case.[9] In his comments, he divided his discussion into four points. First, it was whether the MPP actually made a "decision". In his analysis, he made a comparative study between the Dutch and the Indonesian legal terms, i.e., the difference between ruling *(putusan)* and decision *(keputusan)*. In his conclusion on this point, he again referred to *Staatlab* 1927 No. 20 and No. 136 and said that the meaning of the term used in the relevant provision was "ruling" *(uitspraak, putusan)* and thus the MPP did not make a decision. Secondly, he said that the analysis made by the Supreme Court on Article 10 of Law No. 14 of 1970 was not exhaustive. According to him, since the Administrative Courts are not general Administrative Courts, it was possible that in implementing Article 10 of Law No. 14 of 1970, other special Administrative Courts might be created. Thirdly, he also pointed out that the Supreme Court had misinterpreted the elucidation of Article 3(1) of Law No. 14 of 1970 by saying that other than the four Courts mentioned in Article 10 and except for arbitration matters, there could not be any other courts. In his explanation, he said that elucidation of Article 3(1) means no other courts were

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9 Hadjon, "Peradilan Pajak di Indonesia dewasa ini. Kontroversi yuridis eksistensi Majelis Pertimbangan Pajak", p. 14-19.

recognised except the Courts of the State. He further said that the Supreme Court should have referred to Article 13 of Law No. 14 of 1970 which provides that "besides the existing Courts, other special courts could be created by the legislation." Fourthly, the Supreme Court in its decision accepted totally the elucidation of Article 48 and thus failed to see the legal conflicts in the legislation that related to the existence of the MPP. This was because, by virtue of *Staatlab* 1927 No. 20 and No. 136 that regulate matters pertaining to appeal on taxation's through the MPP, it was not clear whether the MPP was a special court or an administrative appeal body. Thus Philipus was of the opinion that there was a need to have a precise interpretation of the status of the MPP.

B. Article 54

Problems are also encountered in the application of Article 54(1)-(4) of Law No. 5 of 1986. Before delving into the problems referred to, the relevant provisions are reproduced below:

> "(1) A claim in an Administrative Dispute shall be submitted to the competent Court whose jurisdiction covers the location of the defendant.
>
> (2) When the defendant is more than one Administrative Body or Official, located in more than one jurisdiction the claim shall be submitted at a Court with jurisdiction over the location of one of the Administrative bodies or Officials.
>
> (3) When the defendant is not located within the jurisdiction within which the claimant resides, the claim may be submitted at the court with jurisdiction over the place of residence of the claimant to be transferred to the relevant Court.

> (4) In certain cases based upon the specific character of the relevant Administrative Dispute governed by Government Regulations, the claim may be submitted to the Court with jurisdiction over the place of residence of the claimant."

Some of the problems regarding the implementation of the above provisions are: first, in making a complaint, claimant has to incur expenses for transportation to the Court in the location of the defendant. The common problem here is there are claimants who could not afford to pay for the transportation to get to the Court within the defendant's location.[10] To overcome the problem, financial aid should be given to the poor to ensure that the poor too would be duly protected under the system. Secondly, regarding the implementation of Article 54(4), there is no clear explanation as to when a case is said to be of a specific character that allows the claim to be submitted to the Court with jurisdiction over the place of residence of the claimant.[11] Thus it will be a good thing if the elucidation provides some explanations to Article 54(4) of Law No. 5 of 1986.

C. Article 58

Another provision that needs consideration is Article 58 which provides that if it is necessary, the Judges have the authority to order the two disputing parties to personally attend the hearing despite being already represented by an attorney. The problem with this provision is that there is no

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10 Lolutong, "Problematika P.T.U.N." Lecture in "Penataran Hukum Administrasi Negara", Law Faculty University Airlangga, Surabaya, 13 January 1995, p. 3.

11 *Ibid.*

sanction against failure of parties to the dispute to attend the hearing personally. The same problem also applies to Article 93. Article 93 provides that Officials who are called as witnesses are obliged to attend the hearing personally. This article too failed to provide any sanction against any failure by the Officials to attend the hearing personally. Thus to ensure that parties to the proceedings obey the law, it is important to impose legal sanctions in the event of non-compliance of the law. Without any sanction, the provision would remain as a law without any teeth and this might stiffle the primary aim of having a system that could provide legal protection for the citizens.

D. Article 62

Another problem faced in the implementation of Law No. 5 of 1986 is Article 62(4). This Article provides that an objection lodged against the decision of the court which made a determination that a claim by the claimant could not be accepted shall be heard and decided by the Court in a 'short proceeding'. But neither the provision nor the elucidation of the relevant article elaborates or explains what the term means. On this issue, judges have different opinions on the implementation of that procedure. Some judges were of the opinion that both parties need to be heard in the proceeding while others felt that the hearing procedure is not necessary and the court may deal directly with the burden of proof and make a decision thereon.[12]

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12 *Id.*, p. 3-4.

E. Article 67

In practice there are also problems on the implementation of stay of execution as provided by Article 67(2) of Law No. 5 of 1986. Article 67(2) allows the claimant to request for a stay of the execution of the administrative decision. If the Administrative Court finds that it is proper to grant such a request the Court may order the stay of the execution of the administrative decision. However, in practice, the Administrative Body normally does not obey the order of the Administrative Court. According to Paulus,[13] the reason for such refusal by the Administrative Body is due to the fact that the decision on the stay of the execution of the Administrative Decision has not received the force of law. The Administrative Body relies on Article 115 of Law No. 5 of 1986 which provides that only a court decision which has received the force of law can be enforced. This provision refers to the decision of the court at the end of a proceeding. Nevertheless, Paulus argues that the reason given by the Administrative Body is inaccurate. This is because the decision to stay the execution of the Administrative Decision is temporary in nature and it is implemented during the hearing until there is a legally enforceable Court Decision.[14] According to Paulus, there are several instances of defiance in Jakarta despite order by the Administrative Court to stay the execution of the Administrative Decision and the Administrative Court could not mete out any sanction for non-compliance of the order. Besides, Article 116 which makes

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13 *Id.*,4-5.

14 Art. 67(2).

provisions for matters pertaining to the execution of Court decisions is also silent on the question of sanction if there is any failure to obey the Court decision.

In the light of the above discussion, an administrative lawyer from a common law jurisdiction will wonder why the administrators conduct is above the law and why the concept of contempt of court is not used in the face of the problem discussed.

III. LIMITED AMOUNT OF DAMAGES

Another problem that needs to be noted is the limited amount of damages available under the system, i.e. between Rp. 250,000 to 5,000,000. Normally, the claimant incurs losses due to an unlawful Administrative Decision. The problem is, if the claimant is claiming damages for more than Rp. 5,000,000, should he or she claim damages at the Administrative Court together with the action to invalidate the Administrative decision in the Administrative Court or should the claimant bring the claim of damages in the civil court after the decision of the Administrative Court.[15] If the claimant chooses to claim damages at the Administrative Court, could he or she automatically claim the balance of the amount of damages at the civil court and is there any legal provision that permits such an action? Are the civil courts bound by the Administrative Court's decision on the validity of the decision of the Administrative Body or Official if the civil courts are to hear a claim on the

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15 Lolutong, "Problematika PTUN", p. 8-9.

balance of the damages?[16] At the moment, no definite answer can be given to each of the questions posed. It is hoped that the problems may be resolved through legislation or case law.

IV. INTERPRETATION OF LAW NO. 5 OF 1986 BY THE ADMINISTRATIVE COURT'S JUDGES

The system of Administrative Courts in Indonesia is a very young one. It is less than ten years old. Like all new systems, problems are bound to arise in its implementation and the Indonesian system is no exception. The Administrative Court's Judges do face some problems in the interpretation of Law No. 5 of 1986. Hence, there are times where the decisions of the judges are confusing and obviously wrong. The following cases will illustrate this point.

In Ketua Panitia Penyelesaian Perselisihan Perburuhan Pusat (P4P) and others v Subarno Sukarman,[17] a company, PT. Askrindo, was made a party to the dispute as the defendant II intervener. Throughout the whole proceeding, the Supreme Court did not question the status of the company in the dispute. By virtue of Article 1:6 of Law No. 5 of 1986, the "defendant" is an Administrative Body that makes Administrative decision. Based on this definition, the company could not be joined as defendant II intervener but instead should be called as a witness in the proceeding. It is hoped that Supreme Court will clarify on this point in the future.

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16 *Id.*, p. 9.

17 Supreme Court decision dated 21.3.1995 No. 09K/TUN/1994.

In Tuan Hew Tjoe Tjong and Anor v Government of Republic of Indonesia[18], the Administrative Court Judge in the process of determining the validity of the decision of the Administrative Body or Official, issued an eviction order against the claimant in respect of his house. In so doing, the court inadvertently focused its attention on the issue of whether the defendant had acted contrary to the law. In fact the Administrative Court should have concerned itself only with the issue of validity of the decision of the Administrative Body. This is because under Article 53(1) the focus of attention is whether the decision of the Administrative Body or Official is valid or not.

In Ny Dedeh R v Kepala Kantor Pertanahan Kabupaten Bekasi,[19] the Administrative Court Judge was confused regarding the jurisdiction of the Administrative Court as to the ownership of land. In that case, the Judge was right in declaring that the transfer of the land under dispute was invalid. But the Judge should not have made a decision returning the title of the land to the original owner. This is because, based on the Supreme Court Circular 224/Td.TUN/X/1993, only the civil court is competent to determine who is the rightful owner of the land while the Administrative Court Judge is only competent to resolve matters pertaining to the certification of the land.

In Rustan Br. Tohang v Gabenur Kepala Daerah Tingkat I Sumatera Utama Di Medan[20], a case regarding the validity of pension given to

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18 No. 07/G/PTUN-JKT/1991.
19 No. 25/G/PTUN-BDG/1993.
20 No. 34/G/1991/PTUN-MDN.

the first wife and the child of the deceased, the Administrative Court had concerned itself more with the validity of the marriage rather than the validity of the decision to grant pension. The Administrative Court should have emphasised on the question of the validity of the latter. Though the decision of the Administrative Court is right on the question of pension entitlement, by paying more attention to the validity of the marriage, it gives the impression that the Court is confused as to which of the two is more important. It must be pointed out that the validity of the marriage is within the jurisdiction of the civil court for a non-Muslim.

In HU v Ketua Panitia Penyelesaian Perselisihan Perburuhan Pusat (P4P),[21] the matter involved the calculation of the remuneration received by the claimant after the termination of his employment. To determine the appropriate amount of remuneration to be paid to the claimant, it is important to determine the effective date of the termination of the claimant. According to Article 97(9)(b) of Law No. 5 of 1986, the Court in making decision could only revoke the order made by the Administration, and order them to make a new decision. However, in this case the Administrative Appeal Court Judge in making his decision, not only revoke the decision made by the defendant and order the defendant to make a new decision but the Judge had also included in his decision the effective date of termination of employment. This is against Article 97(9)(b) because it should be the defendant who would determine the effective date of termination in its new decision. Thus, the Administrative Court Judge had made

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21 Reg. No. 4K/TUN/1992.

a mistake in his decision. The Supreme Court corrected the mistake when the matter was brought up at the cassation level.

Though the above cases highlighted some mistakes committed by the court in the application and interpretation of Law No. 5 of 1986, they are in no way detracted from the primary function of the Administrative Courts to provide legal protection for the citizens of Indonesia. To avoid misinterpretation and misapplication of Law No. 5 of 1986 and other relevant legislation in force, seminars and short courses have been organised for those who are involved in this field. One of the more active universities in Indonesia has organised and conducted such seminars and courses. That university is none other than Universitas Airlangga, Surabaya, Indonesia. With these seminars and courses, it helps to impart more information and understanding and insight into the implementation of the system of Administrative Courts in Indonesia as regulated by Law No. 5 of 1986 and other relevant legislation and regulations. Besides seminars and courses, there are a number of annotations made to the reported Administrative Law cases. From these annotations and remarks, the misinterpretation made in the decisions is highlighted.

V. CONCLUSION

Factors responsible for some of the problems encountered in the interpretation and implementation of the system of Administrative Courts in Indonesia are insufficient provisions in the relevant legislation that regulates the working of the system; and the reluctance of the Administrative Body to obey

order of stay of execution of Administrative Decision or the execution of the final order of the Administrative Court due to the lack of enforcing power *(upaya memaksa, dwang middelen)* on the part of the Administrative Court.[22]

In order to overcome the problems mentioned above, it is recommended that a commission be set up to look into the loopholes or weaknesses of Law No. 5 of 1986 and other relevant legislation or regulations. The commission should then be given the task to make a report on all aspects of the problems encountered and make recommendations thereon to overcome them. Follow-up legislation must follow in order to carry out recommendations made.

Since the Indonesian Administrative System is a relatively new and young one, it is very important to have a training institute to train administrators and judges whose functions and duties involve the use and application of Administrative Law. The institute should be manned and staffed by experts in Administrative Law. In the long run, it would certainly help to train and produce personnel learned in the field of Administrative Law. This is important because the Administrative Courts form one of the four components of the judicial system in Indonesia under Law No. 14 of 1970. There is thus an urgent need to have legally trained and qualified personnel specialised in the field of Administrative Law.

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22 Lolutong, *op.cit.*, p. 10-11.

CHAPTER X

CONCLUDING REMARKS

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In the light of the discussion on the System of Indonesian Administrative Courts in the foregoing chapters, certain peculiar features of the system need to be reiterated and several remarks thereon are inevitable although some of them are quite obvious while a few others have already been adverted to previously. It must be stressed again that by virtue of the 1945 Constitution[1] and *Pancasila*[2] the primary aim of establishing the Administrative Courts in Indonesia is to provide protection not only for the rights of individuals but also the rights of society. The Indonesian System of Administrative Courts are composed of the first instance Administrative Court, the Court of Appeal which exercises appellate administrative jurisdiction, and the Supreme Court as the highest court of the system with its appellate and reviewing jurisdiction over administrative matters.

The Indonesian System of Administrative Courts has a mixture of common law and civil law features with a particular bias on the latter. Certain

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1 Indonesian Constitution today.

2 The five basic principles of the Republic of Indonesia.

outstanding features, mainly procedural in nature, of the system need to be emphasised as they could be put to good use by the courts. The Administrative Court Judge is allowed to determine the burden of proof and plays an active role in an Administrative proceeding. The Judge may visit and examine premises away from the court in order to evaluate and assess the subject-matter of the dispute. The system also emphasises on speedy trials and saving of costs besides the waiver of fees and assistance to the poor and the illiterate. The problem of limited free use of evidence by the Administrative Courts as highlighted earlier because of Articles 100 and 107 could be easily solved by allowing the Judges more freedom in the use and admission of evidence.

The system of Administrative Courts in Indonesia may also guarantee that the administrative justice will be uniformly, coherently and consistently applied throughout the entire system. This is possible because under the system, there is a general right of appeal from an Administrative Court to the Administrative Appeal Court. The administrative justice culminates in the Supreme Court which supervises the Administrative Appeal Court. Another contributing factor is that the Administrative Court Judges are experts who are learned and specialised in matters of Administrative Law.

Since there is no legal binding precedent in the Indonesian Legal System, it allows flexibility in decision-making on Administrative disputes if one were to view this aspect positively. This is because the Administrative Courts Judges may be able to adapt and fashion their decisions in order to suit the

changing circumstances or to abandon old ways whenever new factual situations so demand.

The Indonesian system also allows for the use of unwritten rules of Administrative Law, for example, the application of the concept of due or good administration. The application of this concept has widened the scope of judicial review against administrative action. Based on case law, there are four principles[3] under the concept of due or good administration in Indonesia. The administrators are obliged to apply this concept in their administrative action. If it is practised properly by the administrators, it would help to portray a good image of the administrative system and the citizens would be better protected against unlawful action by the administration. Of course, it must be confessed here that the theoretical and practical aspects of the law are two different things altogether. The two need not necessarily coincide.

Independence of Administrative Court Judges is another vital issue in settling administrative disputes between the government and the citizens. As an outsider, the writer is unable to really assess the situation objectively due to her limited stay in Indonesia.

A fair feature of the Indonesian system of administrative jurisdiction is the availability of damages against an unlawful administrative

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[3] The principles are: formal meticulousness or carefulness, prohibiting arbitrariness, fairness and equality.

action. There is clear and express statutory provision for this remedy. Such a remedy is not available under the common law system except when an unlawful action is also tortious. However, the amount of damages that could be awarded by the Administrative Courts against the Administrative body is very limited indeed - between Rp. 250,000 to Rp. 5,000,000. In practice, the ceiling imposed may prove to be inadequate in most cases. Therefore, in order to give effect the primary aim of the establishment of Administrative Courts, an amendment of the law is necessary. The judges should perhaps be given the discretion to determine the rightful amount in the light of the particular circumstances of each case.

Six or seven years after the establishment of the Administrative Courts in Indonesia, there are some positive changes in the attitude of the Judges. From decided cases, the Judges now are more prepared to declare an Administrative Decision as invalid if there is an unlawful action or decision by the Administration. The effectiveness of the system depends on, among other things, the willingness and readiness of the Judges to subject the administration to the Rule of Law. The effort of courts in this direction must be intensified until one can proudly claim that the Administrative Courts are the bulwark of individual liberties and guardian of administrative morality.

The system will really run smoothly if there is also an accompanying change of attitude on the part of the administrators. They too must be made to realise that they are not above the law. They too must abide by the law.

This analysis of the Indonesian system reveals that the system contains some defects and weaknesses and problems have been encountered in the implementation thereof. With due respect and in all fairness to the system, it must be said that the philosophy and ideals of the Indonesian State Constitution and the *Pancasila* are very well intentioned - the legal protection of the citizens against unlawful or arbitrary action or decision of the Administration or the Government. The system of administrative courts is a bold attempt to put the philosophy and ideals into reality. The system as stated before is very biased towards the civil law system particularly with regards to the principles of administrative law. The administrative court structure does not fully reflect the civil law structure in that in Indonesia the Supreme Court still exercises control over the administrative courts by virtue of its appellate and reviewing powers. The Administrative Judges are civil servants and they are entrusted with a very heavy and difficult responsibility of imposing controls over the Administration or the Government whose officials are still not yet fully attuned to the Rule of Law. The French *Droit Administratif* works fine but the same may not necessarily be so in the case of the Indonesian Administrative Court System.

In all fairness to and with great expectations from the Indonesian system, what the young system needs now is time to work it out and improve upon it gradually and conscientiously. Given the time and continuous and unfailing commitment from all parties involved, there is no reason why the Indonesian system cannot work fine and thrive in future. A time may come in the future for the Indonesians to pride themselves by claiming that their system

is one based on the constitutional concept of Rule of Law and also really practises the Rule of Law if all the parties involved are fully committed towards achieving the national philosophy and ideology.

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APPENDIX

APPENDIX 1

PRESIDENT

OF THE REPUBLIC OF INDONESIA

ACT OF THE REPUBLIC OF INDONESIA NUMBER 5 OF 1986 REGARDING ADMINISTRATIVE JUSTICE

WITH THE BLESSING OF ALMIGHTY GOD

THE PRESIDENT OF THE REPUBLIC OF INDONESIA,

Considering that : a. the nation of the Republic of Indonesia as a nation of law based upon the Pancasila and the Constitution of 1945 aims to realise for the nation and people a lifestyle of prosperity ,security, tranquillity and order which guarantees the equal status of all citizens before the law and which guaranties the safeguarding of harmonious,balanced and cooperative relations between the organs of national administration and citizens in the community.

b. in realising this way of life,by giving content to our independence through gradual national development we attempt to construct,perfect and control the Administrative Organs of State to facilitate their development into organs which are efficient,effective,clean and authoritative,and which in implementing their tasks always base their actions on law supported by a spirit and attitude of service to society.

c. although national development will create conditions in which every citizen may enjoy an atmosphere and climate of legal order and certainty with justice as it's essence,in the course of it's implementation there is a possibility of conflicts of interests,disagreement and disputes arising between State Administrative Bodies and Officials and citizens,which may disrupt or hamper the course of national development;

d. for the settling of such disputes,the existence of an Administrative Justice system is required with power to uphold justice,truth,order and certainty in the law resulting in the capacity to offer protection to society,particularly in it's relations with State Administrative Bodies and Officials;

e. in relation to these considerations,and in accordance with Act Number 14 of 1970 regarding Basic Provisions on Judicial Power, an Act regarding State Administrative Justice is necessary.

Remembering :

1. Section 5 paragraph (1) ,Section 20 paragraph (1),Section 24,and Section 25 of the Constitution of 1945;

2. Determination of the Peoples Consultative Assembly of the Republic of Indonesia Number IV/MPR/1978 in conjunction with Determination of the Peoples Consultative Assembly of the Republic

of Indonesia Number II/MPR/1983 regarding the Broad Guidelines of State Policy;

3. Act Number 14 of 1970 regarding Basic Provisions on Judicial Power (State Document Number 74 of 1970,Supplementary State Document Number 2951);

4. Act Number 14 of 1985 regarding the Supreme Court (State Document Number 73 of 1985,Supplementary State Document Number 3316);

With the Assent of

THE PEOPLES REPRESENTATIVE COUNCIL OF THE REPUBLIC OF INDONESIA

DETERMINES

To provide for : AN ACT REGARDING STATE ADMINISTRATIVE JUSTICE.

CHAPTER 1
GENERAL PROVISIONS

Part One
Interpretation

Section 1

In this Act:

1. State Administration is the process of carrying out the functions of implementing the affairs of both central and regional government;
2. A State Administrative Body or Official is a body or official which implements the affairs of government on the basis of operative law;
3. A State Administrative Decision is a written determination handed down by an administrative body or official containing a legal act of State Administration based on operative law which is of a concrete,individual and final nature and which creates legal consequences for a person or civil law body;
4. A State Administrative Dispute is a dispute arising in the arena of State Administration between a person or civil law body and a State Administrative Body or Official at the central or regional level as a result of the handing down of a State Administrative Decision under operative law,and includes public service disputes;
5. A Claim is a request in the form of a demand made to a State Administrative Body or Official and submitted to a Court for judgement;
6. The ~~Plaintiff~~ Petitioner is the State Administrative Body or Official who hands down a decision on the basis of the authority vested or delegated to him which is being challenged by the person or civil law body;
7. The Court is the State Administrative Court and/or the State Administrative Appeal Court in the jurisdiction of State Administrative Justice;
8. The Judge is a Judge of the Administrative Court and/or the Administrative Appeal Court.

Section 2

The following are not included within the definition of a State Administrative Decision within the meaning of this Act:

a. State Administrative Decisions which represent a civil law activity;
b. State Administrative Decisions which represent regulations of a general nature;
c. State Administrative Decisions which still require assent;
d. State Administrative Decisions which are handed down on the basis of provisions of the Criminal Law Code or the Criminal Law Procedure Code or other laws of a criminal nature;
e. State Administrative Decisions which are handed down on the basis of an investigation by a judicial body on the basis of the provisions of operative law;

f. State Administrative Decisions regarding the administration of the Armed Forces of the Republic of Indonesia;
g. A decision of the Indonesian Electoral Commission both central and regional regarding the results of a general election.

Section 3

(1)When a State Administrative Body or Official fails to hand down a decision when it is their obligation to do so such failure shall be considered to be a State Administrative Decision.
(2) When a State Administrative Body or Official fails to hand down the requested decision,and the time period specified by law within which the decision must be made has elapsed,the Administrative Body or Official shall be considered to have refused to hand down the decision.
(3) In cases where the relevant law does not specify a time period for making a decision for the purposes of paragraph (2) ,then after the elapse of four months after receiving the request the relevant Administrative Body or Official shall be considered to have handed down a decision refusing the request.

Part Two
Status

Section 4

The State Administrative Justice system is one of the organs of judicial power through the people may seek justice in administrative disputes.

Section 5

(1)Judicial power in the jurisdiction of Administrative Justice is exercised by:
a. State Administrative Courts;
b.State Administrative Appeal Courts.
(2) Judicial power in the jurisdiction of State Administrative Justice climaxes at the Supreme Court as the Highest National Court.

Part 3
Location of Courts

Section 6

(1) State Administrative Courts sit in the major or capital city of each regency,and their jurisdiction will cover the area of that major city or regency.
(2) State Administrative Appeal Courts sit in the capital city of each province,and their jurisdiction shall cover the territory of the province.

Part 4
Formation

Section 7

(1) The technical formation of the justice system for the Court shall be implemented by the Supreme Court.
(2) The formation of the organisation,administration and finances of the Court shall be implemented by the Department of Justice.
(3) The formation of the Court as provided for by paragraph (1) and paragraph (2) shall not diminish the independence of the Judges in investigating and deciding Administrative Disputes.

CHAPTER II
COMPOSITION OF THE COURT

Part 1
General

Section 8

The Court shall comprise:
a. The State Administrative Court which represents a court of first instance;
b. The State Administrative Appeal Court which represents an appellate court.

Section 9

The Administrative Courts shall be created by Presidential Decision

Section 10

The Administrative Appeal Courts shall be created by an enactment.

Section 11

(1) The Court comprises an Executive,a Judicial Bench,a Clerk and a Secretary.
(2) The Executive comprises a Chairperson and a Deputy Chairperson.
(3) The Judicial Bench of the Administrative appeal Court is the High Bench.

Part Two
Chairperson,Deputy Chairperson,Judges and Clerk of the Court

Paragraph 1
Chairperson,Deputy Chairperson and Judges

Section 12

(1) A Judge of the Court is an official who undertakes the responsibility of Judicial Power.
(2) Conditions and manner of appointment and termination of Judges,and the manner in which a Judge carries out his or her duties are laid down in this Act.

Section 13

(1) Appointment and general supervision of a Judge as a public servent,is the responsibility of the Minister for Justice.
(2) Appointment and supervision as described in paragraph (1),shall not diminish the independence of the Judge in investigating and deciding Administrative Disputes.

Section 14

(1) To be appointed as Judge of the State Administrative Court,a candidate must fulfil the following conditions:
   a. be an Indonesian citizen;
   b. be devoted to the belief in one Almighty God;
   c. be faithful to the Pancasila and the Constitution of 1945;
   d. not be a former member of the banned Indonesian Communist Party or any of its mass organisations and not be a person who was directly or indirectly involved in "the Indonesian Communist Party's Counter Revolutionary Movement of 30th September (G.30.S/PKI)" or any of it's other prohibited organisations;
   e. be a public servant;
   f.be a law graduate or a graduate in another discipline with expertise in the field of State Administration;
   g. be at least twenty five years of age;
   h. be responsible,honest,just and not of culpable character.
(2) To be appointed as Chairperson or Deputy Chairperson of an Administrative Court at least ten years experience as a Judge of the Administrative Court is required.

Section 15

(1) To be appointed as Judge of the Administrative Appeal Court a candidate must fulfil the following conditions:
   a. the conditions contained in Section 14 paragraph(1),letters a,b,c,d,e,f,and h;
   b.be at least forty years of age;
   c.have at least five years experience as Chairperson or Deputy Chairperson of the Administrative Court,or at least fifteen years experience as a Judge of the Administrative Court.
(2)To be appointed as Chairperson of the Administrative Appeals Court at least ten years experience as Judge of the Administrative Appeals Court or at least five years experience as Judge of the Administrative Appeals Court after serving as Chairperson

of the Administrative Court is required.

(3) To be appointed as Deputy Chairperson of the Administrative Appeals Court at least eight years experience as Judge of the Administrative Appeals Court or at k least three years experience as Judge of the Administrative Appeals Court after serving as Chairperson of the Administrative Court,is required.

Section 16

(1)A Judge is appointed and stood down by the President as Head of State on advice of the Minister for Justice with the assent of the Chief Justice of the Supreme Court.
(2) The Chairperson and Deputy Chairperson of the Court shall be appointed and stood down by the Minister for Justice with the assent of the Chief Justice of the Supreme Court.

Section 17

(1) Before taking up their office the Chairperson,Deputy chairperson and Judges are obliged to swear an oath or affirmation according to their religion or belief;the oath or affirmation shall be as follows:
"I solemnly swear/promise that I,in obtaining my position did not,directly or indirectly,by using any name or method,give or promise anything to any person at all".
"I swear/promise that I ,in doing performing or omitting to perform any duty of this office,will never directly or indirectly receive any promise or gift from any person".
"I swear/promise that I shall be faithful to and shall defend and apply the Pancasila as the basis and ideology of the State,the Constitution of 1945 and all Acts and other legislation operating in the Republic of Indonesia".
"I swear/promise that I shall continually carry out my office with honesty, conscientiousness and without prejudice,and will in performing my duties,behave as properly and as justly as is fitting for a Chairperson/Deputy Chairperson/Judge of sound and honest character in upholding law and justice".
"I solemnly swear/promise that I,in obtaining my position did not,directly or indirectly,by using any name or method,give or promise anything to any person at all".
"I swear/promise that I ,in doing,performing or omitting to perform any duty of this office,will never directly or indirectly receive any promise or gift from any person".
"I swear/promise that I shall be faithful to and shall defend and apply the Pancasila as the basis and ideology of the State,the Constitution of 1945 and all Acts and other legislation operating in the Republic of Indonesia".
"I swear/promise that I shall continually carry out my office with honesty, conscientiousness and without prejudice,and will in performing my duties,behave as properly and as justly as is fitting for a Chairperson/Deputy Chairperson/Judge of sound and honest character in upholding law and justice".
(2) The Deputy Chairperson and Judge of the Administrative Court shall swear the oath or promise to the Chairperson of the Administrative Court.
(3) The Deputy Chairperson and Judge of the Administrative Appeal Court and the Chairperson of the Administrative Court shall swear their oath or promise to the Chairperson of the Administrative Appeal Court.
(4) The Chairperson of the Administrative Appeal Court shall swear their oath or promise to the Chief Justice of the Supreme Court.

Section 18

(1) Unless specified otherwise by or on the basis of an enactment ,a Judge shall not concurrently serve as:
a. a bailiff of the court;
b. guardian,loco parentis or official involved in a case being heard by them;
c.an entrepreneur.
(2) A Judge shall not concurrently act as a legal adviser.
(3) Offices which shall not be concurrently by a Judge apart from those specified in paragraph (1) and paragraph (2) shall be more completely specified in Government Regulations.

Section 19

(1) Chairperson,Deputy Chairperson and Judge may be dismissed from office with honour because of:
   a. their own request;
   b. persistent physical or emotional illness;
   c. they reach the age of sixty years for a Chairperson,Deputy Chairperson and Judge of the Administrative Court or forty three years for a Chairperson,Deputy Chairperson and Judge of the Administrative Appeal Court;
   d. an obvious inability to continue to carry out their duties.

(2) Chairperson,Deputy Chairperson,and Judge who passes away shall be considered to have been automatically dismissed with honour by the President as Head of State.

Section 20

(1) The Chairperson,Deputy Chairperson and Judge may be dismissed from office without honour for the following reasons:
   a. they have been found guilty of a criminal action;
   b. they have committed a culpable act;
   c. they have repeatedly neglectful of their responsibilities in the course of carrying out their duties;
   d. they have violated their oath or affirmation of office;
   e. they have violated a prohibition contained in Section 18

(2) An inquiry into the possibility of dismissal without honour under Paragraph(1) letters b,c,d and e shall be held after the relevant person has been given the opportunity to defend him or her self before the Judicial Honour Council.

(3)The creation,composition and procedures of the Judicial Honour Council and the self-defence procedures shall be formulated by the Chief Justice of the Supreme Court and the Minister for Justice.

Section 21

A Judge who is dismissed from office is not automatically dismissed as a public servant.

Section 22

(1) A Chairperson,Deputy Chairperson and Judge,before being dishonourably dismissed under section 20 paragraph (1),may be suspended from office by the President as Head of State on the advice of the Minister for Justice with the assent of the Chief Justice of the Supreme Court.

(2) The provision in Section 20 paragraph (2) also applies to an inquiry into the possibility of suspension under paragraph (1).

Section 23

(1) When a Judge is the subject of an arrest warrant and is arrested he or she is automatically suspended from office.

(2) When a Judge faces accusation in a criminal case in a State Court under Section 22 paragraph (4) of Act Number 8 of 1981 regarding Criminal Procedure without being arrested,he or she may be suspended from office.

Section 24

More detailed provisions regarding honourable discharge,dishonourable discharge and suspension as well as the rights of officials facing discharge,shall be regulated by Government Regulations.

Section 25

(1) The status of Judicial protocol shall be regulated by Presidential Determination.

(2) Allowances and other provisions regarding the position of Chairperson,Deputy Chairperson and Judges shall be regulated by Presidential Determination.

Section 26

(1) The Chairperson,Deputy Chairperson and Judge may be arrested or detained only by order of the Attorney General with the assent of the Supreme Court and the Minister of Justice.

(2)In the case of:
a. being caught in the act of committing a crime,or
b. being suspected of having committed a criminal act punishable by the death penalty,or
c. being suspected of having committed a crime threatening national security.
The Chairperson,Deputy Chairperson and Judge may be arrested without the order or assent required by paragraph (1).

Paragraph 2
The Clerk of Court

Section 27
(1) In every Court there shall be a secretariat headed by a Clerk.
(2) In performing his or her duties the Clerk of Court shall be assisted by a Deputy Clerk ,several Junior Clerks and several Relief Clerks

Section 28
To be appointed as a Clerk of the Administrative Court a candidate must fulfil the following conditions:
a. be an Indonesian citizen;
b. be devoted to a belief in one Almighty God;
c. be faithful to the Pancasila and the Constitution of 1945;
d. posses at least a Bachelor of Laws degree;
e. have at least four years experience as a Deputy Clerk or at least seven years experience as a Junior Clerk of the Administrative Court or have held office as Deputy Clerk of the Administrative Appeals Court.

Section 29
To be appointed as Clerk of the Administrative Appeals Court a candidate must fulfil the following conditions:
a. the conditions contained in Section 28 letters a,b and c;
b. posses a law degree;
c. have at least four years experience as Deputy Clerk or eight years as Junior Clerk of the Administrative Appeals Court or four years experience as a Clerk of the Administrative Court.

Section 30
To be appointed as Deputy Clerk of the Administrative Court a candidate must fulfil the following conditions:
a. the conditions contained in Sections 28 letters a,b,c,and d;
b. have at least four years experience as Junior Clerk or six years experience as Relief Clerk of the Administrative Court.

Section 31
To be appointed as Deputy Clerk of the Administrative Appeals Court a candidate must fulfil the following conditions:
a. the conditions contained within Section 28 letters a,b,and c;
b. possess a law degree.
c. have at least four years experience as Junior Clerk or seven years as Relief Clerk of the Administrative Appeals Court or six years experience as Deputy Clerk of the Administrative Court or have held office of Clerk of the Administrative Appeals Court.

Section 32
To be appointed as Junior Clerk of the Administrative Court a candidate must fulfil the following conditions:
a. the conditions outlined in Section 28 letters a,b,c,and d;
b. have at least three years experience as a Relief Clerk of the Administrative Court.

Section 33
To be appointed as Junior Clerk of the Administrative Appeals Court a candidate must fulfil the following conditions:
a. the conditions outlined in Section 28 letters a,b,c and d;
b. have at least three years experience as Relief Clerk of the Administrative Appeals Court

or four years as Junior Clerk or eight years as Relief Clerk of the Administrative Court or have held office as Deputy Clerk of the Administrative Appeals Court.

Section 34

To be appointed as Relief Clerk of the Administrative Court a candidate must fulfil the following conditions:

a. the conditions contained in Section 28 letters a,b,c and d;
b. have at least five years experience as a public servant in the Administrative Court.

Section 35

To be appointed as Relief Clerk of the Administrative Appeals Court a candidate must fulfil the following conditions:

a. the conditions contained in Section 28 letters a,b,c and d;
b. have at least five years experience as Relief Clerk of the Administrative Court or ten years experience as a public servant in the Administrative Appeals Court.

Section 36

(1) Unless specified otherwise by or on the basis of legislation,clerks shall not concurrently serve as guardian,support or official involved in a case in which he or she is acting as Clerk.
(2) A Clerk shall not concurrently act as a legal adviser.
(3) Any offices which cannot be concurrently held by a Clerk apart from those specified in paragraphs (1) and (2) shall be more completely specified by the Minister for Justice with the assent of the Chief Justice of the Supreme Court.

Section 37

The Clerk,Deputy Clerk Junior Clerk and Relief Clerk are appointed to and discharged from office by the Minister for Justice.

Section 38

Duties and responsibilities,organisational composition and the work procedure of the Court Secretariat shall be more completely regulated by the Supreme Court.

Section 39

Before taking up their office,the Clerk,Deputy Clerk,Junior Clerk and Relief Clerk shall swear an oath or affirmation according to their religion or belief to the Chairperson of the Relevant Court;the oath or affirmation shall be as follows:

"I solemnly swear/promise that I,in obtaining my position did not,directly or indirectly,by using any name or method,give or promise anything to any person at all".
"I swear/promise that I ,in performing or omitting to perform any duty of this office,will never directly or indirectly receive any promise or gift from any person".
"I swear/promise that I shall be faithful to and shall defend and apply the Pancasila as the basis and ideology of the State,the Constitution of 1945 and all Acts and other legislation operating in the Republic of Indonesia".
"I swear/promise that I shall continually carry out my office with honesty, conscientiousness and without prejudice,and will in performing my duties,behave as properly and as justly as is fitting for a Chairperson/Deputy Chairperson/Judge of sound and honest character in upholding law and justice".

Part Three

The Secretary

Section 40

In each Court there shall be a Secretariat headed by a Secretary who is assisted by a Deputy Secretary.

Section 41

The Court shall serve concurrently as the Court Secretary.

Section 42

To be appointed as Deputy Secretary of the Administrative Court a candidate must fulfil the following conditions:
a. be an Indonesian citizen;
b. be devoted to the belief in One Almighty God;
c. be faithful to the Pancasila and the Constitution of 1945;
d. possess at least a degree of Bachelor of Arts or Bachelor of Administration;
e. posses some experience in the field of administration of justice.

Section 43

To be appointed as Deputy Secretary of the Administrative Appeals Court a candidate must fulfil the following conditions:
a. the conditions contained within Section 42 letters a,b and c;
b. possess a degree of Bachelor of Laws or Bachelor of Administration.

Section 44

The Deputy Secretary is appointed and discharged by the Minister for Justice.

Section 45

Before taking up their office,the Secretary,Deputy Secretary shall swear an oath or affirmation according to their religion or belief to the Chairperson of the relevant Court;the oath or promise shall be as follows:

"I swear/promise:
"that I,being appointed as Secretary/Deputy Secretary will be faithful and fully devoted to the Pancasila,the Constitution of 1945.the nation and the Government".
"that I shall observe all operative laws and shall carry out the official duties entrusted to me with total submission,awareness and responsibility".
"that I shall continually uphold respect for the nation and government and the prestige of the office of Secretary/Deputy Secretary while always placing the interests of the nation before the interests of myself,any other person or group".
"that I shall hold as confidential anything which is by it's nature or according to my instructions confidential".
"that I shall work with honesty,discipline,conscienciousness and enthusiasm in the interests of the nation".

Section 46

(1) The Secretary of the Court is charged with the task of implementing the general administration of the Court.
(2) Duties and responsibilities,organisational structure and work system of the Secretariat shall be regulated more completely by the Minister for Justice.

Chapter III
THE POWERS OF THE COURT

Section 47

The Court has the duty and the authority to hear decide and settle all Administrative Disputes.

Section 48

(1) In the case where a State Administrative Body or Official is given the authority by or on the basis of law to settle certain disputes through administrative review processes then such Administrative Disputes must be settled through those existing avenues of administrative review.
(2) The Court shall only have jurisdiction to hear,decide and settle an administrative dispute of the type referred to in paragraph (1) when all the relevant existing avenues of administrative review have been exhausted.

Section 49

The Court shall not have jurisdiction to hear,decide and settle an Administrative Dispute in cases where the decision under dispute is handed down:
a. during war time,states of emergency,conditions of natural disaster or other situations which are on the basis of law extraordinarily threatening.
b. in situations which are,on the basis of law,of pressing public interest.

Section 50

Administrative Courts have the duty and authority to hear,decide and settle Administrative Disputes at first instance.

Section 51

(1) The Administrative Appeal Court has the duty and authority to hear and decide Administrative Disputes at the appeal level.
(2) The Administrative Appeal Court also has the duty and authority to hear and decide at first and final instance jurisdictional disputes arising between the Administrative Courts within it's jurisdiction.
(3) The Administrative Appeal Court has the duty and authority to hear,decide and settle at first instance Administrative Disputes falling within Section 48.
(4) A decision of the Administrative Appeal Court under paragraph (3) is subject to a request for cassation.

Section 52

(1) The Chairperson of the Court is responsible for the supervision of the implementation of duties and the behaviour of the Judges,Clerks and Secretaries within his or her jurisdiction.
(2) Apart from the responsibility contained in paragraph (1),the Chairperson of the Administrative Appeal Court must undertake the supervision of the course of justice within the Administrative Courts within his or her jurisdiction,and ensure that justice is implemented conscientiously and properly.
(3) In carrying out the supervisory role under paragraphs (1) and (2),the Chairperson of the Court may issue directives,reprimands and memorandums as he or she considers necessary.
(4) The supervision provided for in paragraphs (1),(2) and (3) shall not diminish the independence of the Judges in hearing and settling Administrative Disputes.

Chapter IV
RULES OF PROCEDURE

Part One
Claims

Section 53

(1) An individual or private legal body who feels that it's interests have been injured by a State Administrative Decision may submit a written claim to the competent Court containing a demand that the Administrative Decision under dispute be declared void or invalid,with or without an accompanying demand for compensation and/or rehabilitation.
(2) Reasons which may be used in a claim made under paragraph (1) are:
   a. The ~~State~~ Administrative Decision under challenge conflicts with ~~operative~~ administrative law; act;
   b. The State Administrative Body or Official,in making the decision under challenge had used their authority for a purpose other than that for which it was granted;
   c. The State Administrative Body or Official in making or failing to make the decision under challenge ,after taking into account all the interests affected by the the decision should not have made or failed to make that decision.

Section 54

(1) A claim in an Administrative Dispute shall be submitted to the competent Court whose jurisdiction covers the location of the defendant.
(2) When the defendant is more than one State Administrative Body or Official,located in more than one jurisdiction the claim shall be submitted at a Court with jurisdiction over the location of one of the State Administrative Bodies or Officials.
(3) When the defendant is not located within the jurisdiction within which the claimant resides,the claim may be submitted at the Court with jurisdiction over the place of residence of the claimant to be transferred to the relevant Court.
(4) In certain cases based upon the specific character of the relevant Administrative Dispute governed by Government Regulations,the claim may be submitted to the Court with jurisdiction over the place of residence of the claimant.

(5) When the claimant and the defendant reside or are currently overseas,the claim shall be submitted to the Court in Jakarta.
(6) When the defendant is located within the country and the claimant is overseas,the claim shall be submitted to the Court with jurisdiction over the location of the defendant.

Section 55

A claim must be submitted within a period of ninety days from the moment at which the Decision of the State Administrative Body or Official is received or announced.

Section 56

(1) The claim must contain:
a. the name;nationality,place of residence and occupation of the claimant or his or her representative;
b. the position and location of the defendant;
c. the basis of the claim and the matter which the Court is requested to decide;
(2) When a claim is made and signed by a representative of the claimant,the claim must be accompanied by a valid delegation of authority.
(3) The claim must,whenever possible be accompanied by the Administrative Decision disputed by the claimant.

Section 57

(1) The parties to the dispute may each be accompanied or represented by one or several Attorneys.
(2) The delegation of authority may be executed by a special delegation of authority or may be made orally at the Court hearing.
(3) A delegation of authority made outside the country must be in a form complying with the conditions of the relevant country to the knowledge of the Representative of the Republic of Indonesia in that country and then translated into Bahasa Indonesia by an official translator.

Section 58

When it is considered necessary the Judge has authority to order the two disputing parties to personally attend the hearing,despite being already represented by an attorney.

Section 59

(1) To submit a claim a claimant must pay a case fee in advance,the amount of which shall be fixed by the Court Clerk.
(2) After the claimant has paid the case fee,the claim shall be registered by the Clerk of Court on the register of cases.
(3) Within a maximum of thirty days after the claim is registered,the Judge shall specify the date,time and place for the hearing and order the two parties to be called to attend at the time and place specified.
(4) The letter of notice to the defendant shall be accompanied by a copy of the claim informing him or her that the claim may be answered in writing.

Section 60

(1) The claimant may submit a request to the Chairperson of the Court that he or she be permitted to bring their claim free of charge.
(2) Such a request shall be submitted at the time the claimant submits his or her claim and shall be accompanied by an explanatory letter confirming their inability to pay written by the local or village head person in the applicant's place of residence.
(3) In the explanatory letter it must be stated that the claimant is genuinely unable to afford the case fee.

Section 61

(1) A request made under Section 60 must be checked and declared upheld by the Court before the basis of the dispute is heard.
(2) This declaration is at first instance is final.
(3) The declaration of the Court upholding the claimants request for waiver of the case fees at first instance is also valid at the level of appeal and cassation.

Section 62

(1) In a consultative meeting,the Chairperson of the Court has authority to decide via a declaration with accompanying evaluation that the submitted claim is rejected or without basis for the reason that:
   a. the basis of the claim does not fall within the jurisdiction of the court.
   b. the conditions contained in Section 56 have not been fulfilled by the claimant despite him or her having been informed and reminded of them;
   c. the claim is not based upon acceptable grounds;
   d. the demands made in the claim have already been met by the Administrative Decision under challenge;
   e. the claim was submitted prematurely or after the expiry of the prescribed time limit.

(2) a. A declaration made under Section (1) shall be announced in the consultative meeting after summoning the disputants to listen to it,before the hearing date is fixed;
   b. The summoning of the disputants shall be executed by registered letter from the Clerk of the Court by order of the Chairperson of the Court.

(3) a. An objection to the determination made under paragraph (1) may be submitted to the Court within a period of forteen days after the declaration is announced;
   b. Such an objection shall be submitted in accordance with the provisions of Section 56.

(4) An objection lodged under paragraph (3) shall be heard and decided by the Court in accelerated proceedings.

(5) In the case of the objection being upheld by the Court the declaration under paragraph (1) fails at law and the and the basis of the claim shall be heard, decided and settled in standard proceedings.

(6) No legal avenue is available to challenge the decision on the objection.

Section 63

(1) Before investigation of the basis of the dispute commences, the Judge is obliged to hold a preparatory hearing to clarify a claim which is ambiguous.

(2) In the preparatory hearing under paragraph (1),the Judge:
   a. is obliged to advise the claimant to improve the claim and complete it with the data required within a period of thirty days;
   b. may request an explanation of the State Administrative Body or Official party to the dispute.

(3) When the claimant fails to complete their claim within the time period specified in paragraph (2),the Judge may declare that the claim will not be accepted.

(4) A decision under paragraph (3) is not subject to legal challenge, but a new claim may be submitted.

Section 64

(1) In fixing the date for the hearing,the Judge shall take into account the distance from the location of the hearing that each party resides.

(2) The period of time between the summoning of the parties and the date of the hearing shall not be less than six days,unless the dispute must be heard with the rapid procedure governed by Part Two Paragraph 2.

Section 65

The summoning of the disputing parties shall be considered valid at the moment each has received the summons through a registered letter.

Section 66

(1) In the case of one of the parties residing or being outside the territory of the Republic of Indonesia,the Chairperson of the relevant Court shall issue a summons by directing a letter specifying the hearing date and a copy of the claim to the Department of Foreign Affairs of the Republic of Indonesia.

(2) The Department of Foreign Affairs shall immediately deliver the letter specifying the hearing date and the copy of the claim sent under paragraph (1) through the Representative of the Republic of Indonesia in the territory where the relevant party resides or is.

(3) The officials of the Representative of the Republic of Indonesia are obliged to report to the relevant Court within a period of seven days from the issue of the summons.

Section 67

(1) The claim shall not postpone or prevent the implementation of the Decision of the State Administrative Body or Official nor any actions of the State Administrative Body or Official under challenge.
(2) The claimant may submit a request that the implementation of the Administrative Decision be postponed for the duration of the Administrative Dispute hearing,until there is a legally enforceable Court Decision.
(3) A request under paragraph (2) may be submitted simultaneously as part of the claim and may be decided prior to the central dispute.
(4) A request for postponement under paragraph (2):
a. may be granted in circumstances of such extreme urgency that the interests of the claimant would be seriously injured if the Administrative Decision under challenge was implemented;
b. shall not be granted when,within the framework of development,the public interest compels the implementation of the decision.

Part Two
The Hearing at First Instance

Paragraph I
Hearing with Standard Procedure

Section 68

(1) The Court shall hear and decide an Administrative dispute with a bench of three Judges.
(2) The Court shall sit on the day specified in the summons.
(3) The hearing of the Administrative dispute in the session shall be led by the Chairing Judge of the Session.
(4) The Chairing Judge of the Session is obliged to ensure that order continues to be observed throughout the sitting and that all Court instructions are properly implemented.

Section 69

(1) In the Court,every person is obliged to display character,actions,behavior and expression which honour the authority,prestige and respect for the Court by observing order in the Court session.
(2) Any person who fails to observe order in the Court session as required by paragraph (1),after receiving a warning from and by order of the Chairing Judge of the Session may be expelled from the Courtroom.
(3) Action taken by the Chairing judge of the Session under paragraph (2)towards a breach of discipline ,does not detract from the possibility of prosecution if the breach constitutes a criminal offence.

Section 70

(1) For the purposes of the hearing the Chairing Judge of the Session shall open the session and declare it open to the public.
(2) When the Judicial Council considers that the dispute involves public order or national security,the session may be declared closed to the public.
(3) Failure to fulfil the provisions of paragraph (1) may result in the decision being void at law.

Section 71

(1) Where the claimant or his or her representative fails to attend on the first day of the hearing and on the date fixed by the second summons without reasonable excuse ,despite being properly summoned on both occasions,the claim shall be declared dropped and the claimant must pay the court costs.
(2) In the case described in paragraph (1) the claimant has the right to submit his or her claim once again after paying the case fee in advance.

Section 72

(1) In the case of the defendant or his or her representative failing to attend two consecutive sittings and/or failing to reply to the claim without reasonable justification despite on each occasion having been properly summoned,the Chairing

Judge of the Session may issue a determination requesting the defendant's superior to order the defendant to attend or to reply to the claim.

(2) Where,after the passing of two months after the sending of the determination under paragraph (1) by registered letter a report has not been received from both the defendant's superior and from the defendant,the Chairing Judge of the Session shall.

specify the date of the following session and the hearing of the dispute shall continue with standard procedure without the defendant in attendance.

(3) The decision on the central claim may be handed down only after an investigation into all aspects of evidence has been exhaustively carried out.

Section 73

(1) Where more than one defendant can be identified and one or more of them or their representatives fails to attend the hearing without reasonable justification, the hearing of the dispute may be postponed until a hearing date fixed by the Chairing Judge of the Session.

(2) Postponement of the hearing date shall be announced to the parties in attendance, while the parties not in attendance shall be summoned again by order of the Chairing Judge of the Session.

(3) Where ,on the date of the postponed hearing fixed under paragraph (2) ,the defendant or his or her representative still fail to attend the sitting,the hearing shall proceed in their absence.

Section 74

(1) The hearing of the dispute shall commence with the Chairing Judge of the Session reading the contents of the claim and the letter containing the reply to it ,and when their is no letter of reply,the defendant shall be given the opportunity to submit a reply.

(2) The Chairing Judge of the Session shall give the opportunity to the two parties to clarify any matters raised by either party.

Section 75

(1) The claimant may only alter the reasons underlying his or her claim up until the replic stage,provided that he or she has sufficient reason to do so and that such an alteration will not injure the interests of the defendant. Such considerations must be carefully evaluated by the Judge.

(2) The defendant may only alter the reasons underlying the claim up until the duplik stage,provided that he or she has sufficient reason to do so and that such an alteration will not injure the interests of the claimant.Such considerations must be carefully evaluated by the Judge.

Section 76

(1) The claimant may retract the claim at any time before the defendant submits his or her reply.

(2) When the defendant has already submitted his or her reply to the claim,retraction of the claim by the claimant shall only be permitted by the Court with the consent of the defendant.

Section 77

(1) Exception to the absolute authority of the Court may be proposed at any time during the hearing and although there is no exception to the absolute authority of the Court when the Judge Knows of this matter he is,because of his office ,obliged to state that the Court does not have the authority to hear the relevant dispute.

(2) Exception to the relative authority of the Court may be submitted at any time before the delivery of the reply to the central claim,and the exception must be decided before the central dispute is heard.

(3) Other exceptions not regarding the authority of the Court shall only be decided in conjunction with the central claim.

Section 78

(1) A Judge is obliged to withdraw him or her self from a hearing if he or she is related by blood or marriage to the third degree,or by marriage despite being now divorced to one of the Judges on the bench or the Clerk.

(2) A Judge or Clerk is obliged to withdraw him or her self from a hearing if he or she is related by blood or marriage to the third degree,or by marriage despite being already divorced to the defendant,the claimant or the legal advisers.
(3) A Judge or Clerk who falls within paragraph (1) or (2) must be replaced and when they are not replaced or fail to withdraw,and the case has already been decided,then the dispute shall be immediately reheard with a Court of new composition.

Section 79

(1) A Judge is obliged to withdraw from a case if he or she has a direct or indirect interest in the dispute.
(2) The withdrawal of a Judge or Clerk under paragraph (1) may be voluntarily, or may be at the request of one of the disputing parties.
(3) When there is confusion or a difference of opinion regarding a matter referred to in paragraph (2),the official of the Court has the authority to determine the issue.
(4) The Judge or Clerk satisfying paragraph (1) or(2) shall be replaced and if they are not replaced and fail to withdraw from the case before the dispute is decided,the dispute shall be immediately reheard with a Court of new composition.

Section 80

In the interests of the fluent hearing of a dispute the Chairing Judge of the Session has the right to issue directives to the disputing parties in relation to the legal avenues and the evidence which they may use in the dispute.

Section 81

With the permission of the Chairperson of the Court,the claimant,defendant and their the legal advisers may scrutinise the dispute documents and other relevant official documents within the secretariat,and and make any extracts which they require.

Section 82

The parties involved may,using their own money,make or order to be made copies of or extracts from any hearing documents from their case,with the permission of the Chairperson of the relevant Court.

Section 83

(1) For the duration of the hearing,any person who has an interest in the dispute of another party currently being heard by the Court,either on their own initiative via submission of a request or on the Judges initiative,may participate in the Administrative Dispute,acting as:
    a. a party defending their rights;or
    b. a party to a joint action with one of the other disputing parties.
(2) A request under paragraph (1) may be granted or refused by the Court in a decision included in the report of the hearing proceedings.
(3) A decision of the Court under paragraph (2) is not subject to an independent right of appeal,but must be appealed in conjunction with an appeal against the final decision on the central claim.

Section 84

(1) When,during the hearing a legal representative acts beyond the limits of the authority delegated to him or her,the party granting them the authority may submit a written objection with a demand that the representative's actions be declared void by the Court.
(2) When the objection under paragraph (1) is upheld the Judge is obliged to declare in a decision included in the report of hearing proceedings that the action of the legal representative is void and shall be immediately erased from the report of hearing proceedings.
(3) A decision made under paragraph (2) shall be announced or conveyed to the relevant parties.

Section 85

(1) In the interests of the hearing and when the Chairing Judge of the Session considers it necessary,he or she may order an investigation into documents held by Administrative or other officials bearing the documents,or request an explanation or clarification regarding something relevant to the dispute.
(2) The Chairing Judge of the Session may also order that the relevant documents be shown to the Court at a special sitting organised for that purpose.
(3) When the documents form part of a register,before being displayed by their holder copies of the documents shall be made to replace the originals pending their return from the Court.
(4) When the investigation into the authenticity of a document creates a suspicion that a certain person falsified the document,the Chairing Judge of the Session may send the relevant document to an expert with authority,and the hearing of the Administrative Dispute may be postponed until the decision in the criminal case has been handed down.

Section 86

(1) At the request of one of the parties or at his or in the course of his or her duty the Chairing Judge of the Session may order a witness to give evidence at the hearing.
(2) When a witness fails to attend the hearing without reasonable justification despite having been properly summoned and the Judge has sufficient reason to suspect that the witness deliberately failed to attend ,then the Chairing Judge of the Session may order that the witness be escorted to the hearing by the police.
(3) A witness who resides outside the jurisdiction of the relevant Court is not obliged to attend that Court but may be examined by the Court with jurisdiction over the place of residence of the witness.

Section 87

(1) Witnesses shall be called to the hearing one by one.
(2) The Chairing Judge of the Session shall question the witnesses as to their full name place of birth,sex,age and date of birth,sex,nationality,place of residence,religion or belief,occupation and degree of family or occupational relationship with the claimant or the defendant.
(3) Before giving evidence the witness is obliged to swear an oath or affirmation according to his or her religion or belief.

Section 88

The following people shall not be heard as witnesses:
a. a person related by blood or marriage in a direct vertical line to the second degree to one of the disputing parties;
b. the wife or husband of one of the disputing parties despite being already divorced;
c. children under the age of seventeen years ;
d. a person suffering from memory loss.

Section 89

(1) The following people may request exemption from the obligation to give evidence:
   a. brothers and sisters and brothers- and sisters- in law of the disputing parties.
   b. every person who,because of their status,occupation or office is obliged to maintain the confidentiality of anything related to that status,occupation or office.
(2) The existence or absence of any basis for the obligation to maintain confidentiality claimed under paragraph (1) letter b shall be evaluated by the Judge.

Section 90

(1) All questions directed by one of the parties to a witness shall be submitted through the Chairing Judge of the Session.
(2) When a question,on the evaluation of the Chairing Judge of the Session,has no relevance to the dispute,it shall be rejected.

Section 91

(1) When the claimant or the witness does not understand Bahasa Indonesia,the Chairing Judge of the Session may appoint an interpreter.
(2) Before commencing their duties the interpreter is obliged to swear an oath or affirmation according to their religion or belief to translate information from the language of the claimant or witness into bahasa Indonesia and vice-versa.
(3) A person who becomes a witness in a dispute shall not be appointed as an interpreter in that dispute

Section 92

(1) In the case where a claimant or witness is deaf and/or dumb and illiterate,the Chairing Judge of the Session may appoint an associate of the claimant or witness as a language consultant.
(2) Before commencing their duties the language consultant appointed under paragraph (1) shall swear an oath or affirmation according to their religion or belief.
(3) Where the claimant or witness is deaf or dumb but literate,the Judge may order that all questions or statements be written down and delivered to the deaf and dumb claimant or witness with instructions that they write down their replies and that all questions and answers then be read aloud.

Section 93

Officials who are called as witnesses are obliged to attend the hearing personally.

Section 94

(1) Each witness is obliged to swear an oath or affirmation in a Court Session attended by the disputing parties.
(2) When the disputants have been properly summoned but fail to attend without reasonable justification the witnesses may have their evidence heard in the absence of the disputants.
(3) When a witness is prevented from attending a hearing due to a legally acceptable obstacle ,the Judge with the assistance of the Clerk shall go to the witnesses place of residence to hear the oath or affirmation and the evidence.

Section 95

(1) When a dispute cannot be settled in a single day of the hearing,the hearing shall continue in the subsequent Court sitting.
(2) The continuation of a hearing must be announced to both parties and such an announcement shall serve as a summons for them.
(3) Where one of the parties attends the first day of the hearing but fails to attend on the following day the Chairing Judge of the Session shall order them to be informed of the time,day and date of the next session.

(4) If a party continues to fail to attend the hearing without reasonable justification despite being properly informed under paragraph (3) the hearing shall continue in his or her absence.

Section 96

Where,during the hearing of a dispute there is an action which must be carried out which requires money that money must be initially paid by the party submitting the request that the action be carried out.

Section 97

(1) Where the hearing of a dispute is complete,the two parties shall be given the opportunity to submit their final opinions in the form of their respective conclusions.
(2) After the two parties have submitted their conclusions under paragraph (1) the Chairing Judge of the Session shall announce that the sitting is adjourned to give the bench the opportunity to consult in closed session and evaluate all the evidence relevant to the decision.*(musyawarah)*

(3) The decision arrived at during the consultation of the bench guided by the Chairing Judge of the Bench shall represent the product of unanimous consensus,unless after genuine attempts such consensus is not possible,in which case the decision shall be that of the majority of the bench.*(permufakatan bulat)*

(4) When the consultations under paragraph (3) are unable to achieve a decision,the consultation process shall be postponed until the subsequent consultative meeting of the bench.

(5) When the subsequent consultation by the bench fails to achieve a majority decision then the final decision of the Chairing Judge of the Bench shall be decisive.

(6) The decision of the Court may be handed down on the same day in a public session, or this may be postponed until another date which must be announced to the disputing parties.

(7) The decision of the Court may be in the form of:
a.refusal of the claim;(ditolak)
b.upholding the claim;
c.refusal to accept the claim;(tak diterima)
d.dropping of the claim.(gugur)

(8) Where the claim is upheld,the Court decision may specify the obligation which must be undertaken by the State Administrative Body or Official responsible for handing down the Administrative Decision.

(9) Obligations imposed under paragraph (8) may be in the following forms:
a. revocation of the Administrative Decision under dispute;or
b. revocation of the Administrative Decision under dispute and the creation of a new Administrative Decision;or
c. in the case of a claim based upon Section 3 ,the making of an Administrative Decision.

(10) Obligations imposed under paragraph (9) may be accompanied by an obligation to pay compensation.

(11) In the case of a Court decision made under paragraph (8) involving a public service dispute, in addition to an order under paragraph (9) and (10) an order of rehabilitation may also be granted.

Paragraph 2
Hearing With the Accelerated Procedure

Section 98

(1) When it can be discerned that claimant has sufficiently urgent interests evidenced by his or her reasons for the request,the claimant may request in his or her claim that the Court utilise the accelerated procedure for the hearing.

(2) The Chairperson of the Court shall,within a period of 14 days after receiving the request under paragraph (1),hand down a determination granting or rejecting the request.

(3) The determination made under paragraph (2) is not subject to appeal.

Section 99

(1) A hearing with the accelerated procedure shall be undertaken by a single Judge.

(2) When a request under Section 98 paragraph (1) is granted,the Chairperson of the Court ,shall within a period of seven days after the handing down of the determination under Section 98 paragraph (2) shall fix a day,time and place for the hearing without going through the preparatory investigation procedures contained in Section 63.

(3) The time period for the reply and production of evidence for the two parties shall be fixed at no more than fourteen days.

Part Three
Evidence

Section 100

(1) Admissible evidence is:
a. documents or written evidence;
b. evidence of expert witnesses;
c. evidence of witnesses;
d. admissions of the parties;

e. the knowledge of the Judge.

(2) Information which is common knowledge does not need to be proved.

Section 101

Evidentiary documents are divided into three categories:

a. authentic official documents,that is,documents created by or in the presence of a public official,who has the legal authority to create such document with the intention that it be evidence of the legal action or event contained within it;

b. official documents created underhand, that is,documents created and signed by the relevant parties with the intention that they be evidence of the event or legal action contained within them;

c. other documents which are not official documents.

Section 102

(1) Expert evidence is the opinion of an expert,given under oath at the hearing regarding the matters about which he or she is knowledgable ,on the basis of his or her experience or knowledge.

(2) A person who is not eligible to be a witness is also excluded from giving expert evidence.

Section 103

(1) At the request of one or both of the parties or as part of his duty, the Chairing Judge of the Session may appoint one or several experts.

(2) An expert witness at the hearing must deliver a report,both in written and oral form under an oath or affirmation describing the truth to the best of his or her knowledge.

Section 104

A witnesses opinion shall be considered to be evidence when it deals with matters which the witness has personally experienced,seen or heard.

Section 105

The admissions of the parties cannot be revoked except on the basis of convincing reasons acceptable to the Judge.

Section 106

The knowledge of the Judge are facts which the Judge knows and the truth of which he is convinced.

Section 107

The Judge shall determine what facts must be proved,the burden of that proof and make an evaluation of the proof,the validity of which requires at least two pieces of evidence upon which the Judge bases his findings.

Part Four
The Decision of the Court

Section 108

(1) The Decision of the Court shall be announced at a public sitting.

(2) When one or both of the parties are not in attendance at the time the Court's decision is announced copy of the decision shall be forwarded by registered letter to the relevant party by order of the Chairing Judge of the Session.

(3) Failure to comply with the provisions of paragraph (1) shall result in the Court's decision being invalid and without the force of law.

Section 109

(1) The decision of the Court must contain;

a. A heading of:"IN THE NAME OF JUSTICE BASED ON A BELIEF IN ONE ALMIGHTY GOD";

b. the name,office,nationality,place of residence or location of the disputing parties;

c. a precise summary of the claim and the reply of the defendant;

d. a balancing and evaluation of all evidence submitted and all matters arising in the course of the hearing of the dispute;

e. the legal reasoning forming the basis of the decision;

f. the Court order awarded and the Court costs;
g. the day and date of the decision,the names of the Judges on the bench,the name of the Clerk and a summary of the attendance or the non-attendance of the parties.

(2) Failure to fulfil one of the provisions contained in paragraph (1) may render the Court decision void.

(3) Within thirty days of the announcement of the Court decision,the decision must be signed by the Judge who handed it down,and the Clerk of the hearing.

(4) When the Chairing Judge of the Bench,or in the case of a hearing with accelerated procedure, the Chairing Judge of the Session,is unable to sign the decision,it shall be signed by the Chairperson of the Court with a statement that the relevant Judge is prevented from signing.

(5) When the Judicial Bench are prevented from signing the decision,it shall be signed by the Chairing Judge of the bench with a statement that the relevant Judges were unable to sign.

Section 110

The party who is defeated in the case shall be ordered to pay all or part of the Court costs.

Section 111

The Court costs comprise:

a. the costs incurred by the Secretariat and the cost of materials;
b. the costs incurred by witnesses,experts and interpreters with the condition that a party calling more than five witnesses must pay for the costs incurred by any of those extra witnesses even if that party is successful in the case;
c. the costs of holding a hearing in a place other than the Court room and other costs necessarily incurred in making the decision according to the Chairing Judge of the Session.

Section 112

The total Court costs which are to be paid by the claimant or the defendant shall be noted in the final orders of the Court.

Section 113

(1) A Court decision which is not a final decision ,despite being announced during the hearing is not intended as an independent decision but shall only be included in the report of hearing proceedings.

(2) A party who has a direct interest in the Court decision may request that they receive an official copy of the decision upon payment of the cost of the copy.

Section 114

(1) At every hearing the Clerk shall make a report of the hearing proceedings containing everything which occurred during the hearing.

(2) The report of the hearing proceedings shall be signed by the Chairing Judge of the Session and the Clerk;when one of them is unable to sign the report,this shall be stated in the report of proceedings.

(3) When the Chairing Judge of the Session and the Clerk are both unable to sign the report of proceedings,it shall be signed by the Chairperson of the Court with a statement to that effect.

Part five
Implementation of the Court Decision

Section 115

Only a Court decision which has received the force of law can be enforced.

Section 116

(1) The Clerk of the Court shall ,within fourteen days,send a copy of the legally enforceable Court decision to the disputing parties by registered letter by order of the Chairperson of the Court which heard the case at first instance.

(2) When,within four months after the legally enforceable court decision being sent to the disputants under paragraph (1),the defendant has not yet performed an obligation imposed under Section 97 paragraph (9) letter a,the Administrative Decision under dispute shall cease to have the force of law.

(3) Where the defendant is ordered to perform an obligation under Section 97 paragraph (9) letters b and c and those obligations have not been performed within three months the claimant may submit a request to the Chairperson of the Court referred to in paragraph (1) that the Court order the defendant to implement the Court decision.
(4) If the defendant continues to fail to implement the Court decision,the Chairperson of the Court shall bring the matter to the notice of the defendant's superior authority.
(5) The superior authority referred to in paragraph (4) shall,within two months of receiving notice from the Chairperson of the Court,instruct the relevant official to implement the Court decision as ordered under paragraph (3).
(6) Where the superior authority referred to in paragraph (4) ignores the provisions of paragraph (5) the Chairperson of the Court shall appeal to the President as the holder supreme government authority,to order the relevant official to carry out the Court decision.

Section 117

(1) Where an obligation is imposed under Section 97 paragraph (11) and the defendant is unable or only partially able to implement a legally enforceable Court decision because of circumstances altering after the decision was made and/or received the force of law he or she is obliged to report this matter to the Chairperson of the Court referred to in section 116 paragraph (1)and the claimant.
(2) Within a period of ~~three days~~ thirty days after receiving notice under paragraph (1) the claimant may submit a request to the Chairperson of the Court who sent the legally enforceable Court decision ,that the defendant be obliged to pay a sum of money or other compensation he or she requests.
(3) The Chairperson of the Court after receiving a request under paragraph (2) shall order that the two parties be summoned to attempt to achieve an agreement as to the amount of money or other compensation which the defendant must pay.
(4) When all attempts made to reach an agreement as to the sum of money or other compensation have failed,the Chairperson of the Court shall determine the sum of money or compensation in a declaration accompanied by an adequate evaluation.
(5) The declaration of the Chairperson made under paragraph (4) may be submitted to the to the Supreme Court for redetermination by either the claimant or the defendant.
(6) The decision of the Supreme Court made under paragraph (5) must be obeyed by both parties.

Section 118

(1) Where the decision of the Court referred to in Section 116 paragraph (1) contains an obligation on the defendant under Section 97 paragraph(9),paragraph (10),and paragraph (11) ,a third party who has not yet participated in the dispute hearing under Section 83 and who is concerned that his or her interests may be injured by the implementation of the legally enforceable Court decision may lodge a challenge to the implementation of the decision at the Court which heard the case at first instance.
(2) A challenge under paragraph (1) may only be lodged prior to the implementation of the legally enforceable Court decision and must contain reasons for the request in accordance with the provisions of Section 56; the provisions of Sections 62 and 63 also apply to such a challenge.
(3) A challenge under paragraph (1) does not automatically result in the postponement of the implementation of a legally enforceable Court decision.

Section 119

The Chairperson of the Court is responsible for the supervision of the implementation of the legally enforceable Court decision.

Part Six
Damages

Section 120

(1) A copy of the Court decision containing an obligation to pay damages shall be sent to the claimant and the defendant within three days of the decision receiving the force of law.
(2) A copy of the Court decision containing an obligation to pay damages referred to in

paragraph (1) shall also be sent by the Court to the State Administrative Body or Official which is obliged to pay the damages within three days of the Court decision receiving the force of law.

(3) The amount of damages and the manner of implementing the provisions of Section 97 paragraph (10) shall be more thoroughly regulated by Government Regulations.

Part Seven
Rehabilitation

Section 121

(1) When a Public Service- related claim is upheld as referred to by Section 97 paragraph (11) ,a copy of the Court decision containing the obligation to undertake rehabilitation shall be sent to the claimant and the defendant within three days of the decision receiving the force of law.

(2) A copy of the Court decision containing an obligation to undertake rehabilitation,refered to in paragraph (1) shall also be sent by the Court to the State Administrative Body or Official which is obliged to undertake the rehabilitation, within three days of the decision receiving the force of law.

Part Eight
Hearing at the Appeal Level

Section 122

A decision of the Administrative Court is subject to appeal to the Administrative Appeal Court by both the claimant and the defendant.

Section 123

(1) A request for leave to appeal shall be submitted in writing to the Administrative Court which handed down the decision by the appellant or a representative granted specific authority for this purpose, within fourteen days of the valid reception of the decision.

(2) The request for leave to appeal shall be accompanied by an advance payment of the appeal court case costs,the amount of which is determined by the Clerk.

Section 124

Decisions of the Administrative Court which are not final decisions may only be the subject of a request for leave to appeal in conjunction with the final decision.

Section 125

(1) A request for leave to appeal shall be registered by the Clerk on the register of cases.

(2) The Clerk shall inform the party against which the appeal is lodged of the request.

Section 126

(1) At most thirty days after the request for leave to appeal is registered,the Clerk shall inform the two parties that they may see the case file at the Office of the State Administrative Court thirty days after receiving the information.

(2) A copy of the decision ,the report of proceedings,and other relevant documents must be sent to the Clerk of the Administrative Appeal Court within sixty days of the request for leave to appeal.

(3) The parties may submit an appeal statement and/or counter-statement together with an explanatory letter and evidence to the Clerk of the Administrative Appeal Court with the proviso that a copy of the statement and/or counter-statement is also given to the the other parties with the mediation of the Clerk of Court.

Section 127

(1) The Administrative Appeal Court hears and decides the appeal case with a bench of at least three Judges.

(2) When the Administrative Appeal Court considers that the hearing by the Administrative Court was incomplete ,it may hold it's own session to hold a supplementary hearing,or order the relevant Administrative Court undertake the supplementary hearing.

(3) When a decision by the Administrative Court states that the Court has no jurisdiction to hear the case before it but the Administrative Appeal Court holds the contrary

opinion,the Appeal Court may itself hear and decide the case or order that the relevant Administrative Court hear and decide it.

(4) The Clerk of the Administrative Appeal Court,shall,within thirty days,send a copy of the Appeal Court's decision together with the hearing documents and other relevant documents to the Appeal Court which decided the case at first instance.

Section 128

(1) Provisions contained in Section 78 and Section 79 also apply to a hearing at the appeal level.

(2) Provisions regarding family relationships contained in Section 78 paragraph (1) are also operative in the relationship between the Judge and/or Clerk at appeal level and the Judge and/or Clerk at the first instance Court which heard and decided the same case.

(3) When a Judge decides a case at first instance and subsequently becomes a Judge of the Appeal Court,that Judge is precluded from hearing the same case at the appeal level.

Section 129

Before a request for leave to appeal is ~~lodged~~ decided by the Administrative Appeal Court,the request may be revoked by the appelant,and in this case,the request can not be resubmitted even though the time period for submitting a request for appeal has not yet expired.

Section 130

Where a party has accepted the decision of the Administrative Court,he or she cannot retract that statement even though the time period for submitting a request for leave to appeal has not yet expired.

Part Nine
Hearing at the Cassation level

Section 131

(1) Request may be made for a cassation hearing in the Supreme Court,for a final level decision.

(2) The procedure for the cassation hearing under paragraph (1) shall be in accordance with the provisions of Section 55 paragraph (1) of Act Number 14 of 1985 Regarding the Supreme Court.

Part Ten
The Review Hearing

Section 132

(1) Request may be made for review by the Supreme Court of a Court decision which has received the force of law.

(2) The procedure for the Review hearing under paragraph (1) shall be accordance with the provisions of Section 77 paragraph (1) of Act Number 14 1985 Regarding the Supreme Court.

Chapter V
OTHER PROVISIONS

Section 133

The Chairperson of the Court controls the division of duties between Judges.

Section 134

The Chairperson of the Court allocates all case files and/or other documents relevant to the dispute which have been submitted to the Court to the Judicial bench to be settled.

Section 135

(1) Where the Court hears and decides a particular Administrative law case which requires special expertise,the Chairperson of the Court may appoint an Ad Hoc Judge as a member of the bench.

(2) To be appointed as Ad Hoc Judge a person must fulfil the conditions contained in Section 14 paragraph (1) ,with the exception of letters e and f.
(3) The prohibition referred to in Section 18 paragraph (1) letter c does not apply to the Ad Hoc Judge.
(4) The mode of appointing the Ad Hoc Judge to the Court under paragraph (1) shall be governed by Government Regulations.

Section 136

The Chairperson of the Court shall determine in chronological order which cases must be heard and decided but when a particular case involves the public interest and must be immediately decided,the hearing of that case is given priority.

Section 137

The Clerk of the Court is responsible for undertaking the administration of cases and supervising the duties of the Deputy Clerk ,the Junior Clerk and the Relief Clerk.

Section 138

The Clerk,Deputy Clerk,Junior Clerk and the Relief Clerk are responsible for assisting the Judge by noting and recording the course of the Court sessions.

Section 139

(1) The Clerk is obliged to compile a register of all cases which are received by the secretariat.
(2) In the register of cases,each case is allocated a consecutive number and a summary of it's contents.

Section 140

The Clerk shall make a copy of the Court decision in accordance with the applicable legal provisions.

Section 141

(1) The Clerk is responsible for the management of case files,decisions,documents, official documents,registers,case fees,third party deposits,valuable documents,evidence and other documents held by the secretariat.
(2) No registers,notes,minutes,reports of proceedings and case files may be removed from the secretariat office except with the permission of the Chairperson of the Court or under provisions of law.

Chapter VI
TRANSITIONAL PROVISIONS

Section 142

(1) Administrative disputes, which at the time of the formation of the Courts under this Act are still in the process of being decided by a Court of general jurisdiction,shall continue to be heard and decided by that General Court.
(2) Administrative disputes,which at the moment of the formation of the Courts under this Act,have already been submitted to a Court of general jurisdiction but which have not yet been heard shall be transferred to the Administrative Courts.

Section 143

(1) When this Act first commences operation the Minister for Justice,taking into account the opinion of the Chairperson of the Supreme Court shall control the appointment of Chairpersons,Deputy Chairpersons,Judges,clerks,Deputy Clerks.Junior Clerks.Relief Clerks and Deputy Secretary in all Courts of Administrative Justice.
(2) The appointment of the office of Chairperson,Deputy Chairperson ,Judge ,Clerk, Deputy Clerk ,Junior Clerk ,Relief Clerk ,and Deputy Secretary under paragraph (1) may depart from the other provisions of this Act.

Chapter VII
CONCLUDING PROVISIONS

Section 144

This Act may be referred to as the "State Administrative Justice Act".

Section 145

This Act shall commence operation on the date of enactment and it's implementation shall be governed by Government Regulations within five years of the enactment of this Act.

In order that every person may be informed of it ,the passing of this Act shall be publicised in the Official Gazette of the Republic of Indonesia

Ratified in Jakarta
On the 29th of December 1986
THE PRESIDENT OF THE REPUBLIC OF INDONESIA,
(signature)
SOEHARTO

Enacted in Jakarta
On the 29th of December 1986
SECRETARY OF STATE FOR THE
REPUBLIC OF INDONESIA,
(signature)
SUDHARMONO,LLB

OFFICIAL GAZETTE OF THE REPUBLIC OF INDONESIA
NUMBER 77 OF 1986

APPENDIX 2

BAB VI
UNDANG-UNDANG DASAR 1945
DALAM BAHASA INGGRIS

THE 1945 CONSTITUTION
OF THE
REPUBLIC OF INDONESIA *)

1. THE OPENING TO THE CONSTITUTION

Whereas Independence is the natural right of every nation, colonialism must be abolished in this world because it is not in conformity with Humanity and Justice.

And the struggle of the movement for the independence of Indonesia has now reached the hour of rejoicing by leading the People of Indonesia safe and sound to the gateway of the Independence of an Indonesian State which is free, united, sovereign, just and prosperous.

Thanks to the blessing of God Almighty and impelled by the noble desire to lead their own free national life, the People of Indonesia hereby declare their independence.

Following this, in order to set up a government of the State of Indonesia which shall protect the whole of the Indonesian People and their entire native land of Indonesia, and in order to advance the general welfare, to develop the intel-

*) NASKAH DARI: DEPARTEMEN OF INFORMATION
REPUBLIC OF INDONESIA

lectual life of the nation and to contribute in implementing an order in the world which is based upon independence, abiding peace and social justice, the structure of Indonesia's National Independence shall be formulated in a Constitution of the Indonesian State which shall have the structural state form of a Republic of Indonesia with sovereignty of the People, and which shall be based upon: Belief in the One, Supreme God, just and civilised Humanity, the unity of Indonesia, and democracy which is guided by the inner wisdom in the unanimity arising out of deliberation amongst representatives, meanwhile creating a condition of social justice for the whole of the People of Indonesia.

2. THE CONSTITUTION

Chapter I. Form and Sovereignty.

Article 1

(1) The State of Indonesia shall be a unitary state which has the form of a Republic.

(2) Sovereignty shall be in the hands of the People and shall be exercised in full by the Majelis Permusyawaratan Rakyat.

Chapter II. The Majelis Permusyawaratan Rakyat.

Article 2

(1) The Majelis Permusyawaratan Rakyat shall consist of members of the Dewan Perwakilan Rakyat augmented by delegates from the regional territories and the groups in accordance with regulations prescribed by statute.

(2) The Majelis Permusyawaratan Rakyat shall sit at least once in every five years in the capital of the State.

(3) All decisions of the Majelis Permusyawaratan Rakyat shall be determined by majority vote.

Article 3

The Majelis Permusyawaratan Rakyat shall determine the Constitution and the broad lines of the policy of the State.

Chapter III. The Powers of Government of the State.

Article 4

(1) The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.

(2) In exercising his duties, the President shall be assisted by a Vice-President.

Article 5

(1) The President shall hold the power to make statutes in agreement with the Dewan Perwakilan Rakyat.

(2) The President shall determine the Government Regulations necessary to implement statutes.

Article 6

(1) The President shall be a native-Born Indonesian.

(2) The President and Vice-President shall be elected by the Majelis Permusyawaratan Rakyat by majority vote.

Article 7

The President and Vice-President shall hold office for a term of five years and shall be eligible for re-election.

Article 8

Should the President die, cease form executing or be unable to execute his duties during his term of office, his office shall be taken by the Vice-President until the expiry of that term.

Article 9

Before assuming the duties of office, the President and Vice-President shall take an oath according to the requirements of religion, or shall make a solemn promise, before the Majelis Permusyawaratan Rakyat or the Dewan Perwakilan Rakyat as follows:

Oath of the President (Vice-President)

"I swear before God that, to the best of my ability, I will fulfill as justly as possible the duties of the President (Vice-President) of the Republic of Indonesia; that I will hold faithfully to the Constitution and conscientiously implement all statutes and regulations, and that I will devote myself to the service of Country and Nation".

Promise of the President (Vice-President).

"I solemnly promise that, to the best of my ability, I will fulfill as justly as possible the duties of the President (Vice-President) of the Republic of Indonesia; that I will hold faithfully to the Constitution and conscientiously implement all statutes and regulations, and that I will devote myself to the service of Country and Nation".

Article 10

The President shall hold the highest authority over the Army, the Navy and the Air Force.

Article 11

The President, with the agreement of the Dewan Perwakilan Rakyat, declares war, makes peace and concludes treaties with other states.

Article 12

The President declares the state of emergency. The conditions governing, and the consequences of, the state of emergency shall be prescribed by statute.

Article 13

(1) The President appoints diplomatic representatives and consuls.

(2) The President receives the diplomatic representatives of other states.

Article 14

The President grants grace, amnesties, abolitions and restoration of rights.

Article 15

The President grants titles, decorations and other marks of honour.

Chapter IV. The Supreme Advisory Council

Article 16

(1) The structure of the Supreme Advisory Council shall be prescribed by statute.

(2) This Council shall submit replies to issues raised by the President and shall have the right to submit proposals to the Government.

Chapter V. The Ministers of the State.

Article 17

(1) The President shall be assisted by Ministers of the State.

(2) These Ministers shall be appointed and dismissed by the President.

(3) These Ministers shall lead the Government Departemens.

(2) The structure and powers of those courts of law shall be regulated by statute.

Article 25

The conditions for becoming a judge and for being dismissed shall be prescribed by statute.

Chapter X. Citizens

Article 26

(1) Citizens shall be persons who are native-born Indonesians and persons of other nationality who are legalised by statute as being citizens.

(2) Conditions with regard to citizenship shall be prescribed by statute.

Article 27

(1) Without any exception, all citizens shall have equal position in Law and Government and shall be obliged to uphold that Law and Government.

(2) Every citizen shall have the right to work, and to a living, befitting for human beings.

Article 28

Freedom of association and assembly, of expressing thoughts and of issuing writing and the like, shall be prescribed by statute.

Chapter XI, Religion

Article 29

(1) The State shall be based upon Belief in the One, Supreme God.

(2) The State shall guarantee freedom to every resident to adhere to his respective religion and to perform his religious duties in conformity with that religion and that faith.

Chapter XII. Defence

Article 30

(1) Every citizens shall have the right and the duty to participate in the defence effort of the State.

(2) Conditions concerning defence shall be regulated by statute.

Chapter XIII. Education

Article 31

(1) Every citizen shall have the right to obtain an education.

(2) The Government shall establish and conduct a national educational system which shall be regulated by statute.

Article 32

The Government shall advance the national culture of Indonesia.

Chapter XIV. Social well-being

Article 33

(1) The economy shall be organised as a common endeavour based upon the principle of the family system.

(2) Branches of production which are important for the State and which affect the life of most people shall be controlled by the State.

(3) Land and water and the natural riches contained therein shall be controlled by the State and shall be made use of for the people.

Article 34

The poor, and destitute children, shall be cared for by the State.

Chapter XV. Flag and Language

Article 35

The Flag of the Indonesian State shall be the Honoured Red and White.

Article 36

The Language of the State shall be the Indonesian Language.

Chapter XVI. Alterations to the Constitution

Article 37

(1) In order to alter the Constitution, at least twothirds of the total members of the Majelis Permusyawaratan Rakyat must be in attendance.

(2) A decision shall be taken with the agreement of at least two-thirds of the total number of members who are in attendance.

3. TRANSITIONAL PROVISIONS

Clause I.

The Preparatory Committee for Indonesia's Independence shall regulate and execute the transfer of government to the Indonesian Government.

Clause II.

All existing institutions and regulations of the State shall continue to function so long as new ones have not been set up in conformity with this Constitution.

Clause III.

The President and Vice-President shall be elected for the first time by the Preparatory Committee for Indonesia's Independence.

Clause IV.

Before the Majelis Permusyawaratan Rakyat, the Dewan Perwakilan Rakyat and the Supreme Advisory Council have been set up in conformity with this Constitution, all their powers shall be exereised by the President with the assistance of a National Committee.

ADDITIONAL PROVISIONS

1. Within six months after the end of the Greater East Asia War, the President of Indonesia shall regulate and implement all things which are stipulated in this Constitution.
2. Within six months after the Majelis Permusyawaratan Rakyat has been set up, the Majelis shall sit in order to determine the Constitution.

4. ELUCIDATION OF THE CONSTITUTION GENERAL

I. The written Constitution, a part of Fundamental Law.

The written Constitution of a state is only a part of the Law which is the basis of that state. The Constitution is that part of the Fundamental Law which is written down, while beside that Constitution there also prevails Fundamental Law which is not written down, namely, the basic rules which arise and are maintained in the practice of running a state, although they are not written down.

Certainly, in order to study the Fundamental Law (Droit Constitutionnel) of a state, it is not enough only to study the

its written Constitution (Loi Constitutionnel) alone, but one must also study how it is applied and what is the spiritual background (geistlichen Hintergrund) of that written Constitution.

The Constitution of any state whatsoever can not be understood if merely its text is read alone. Truly, to understand the meaning of the Constitution of a state, we must also study how that text came into being, we must know the explanations made of it and we must also know under what conditions that text was made.

In this way we shall be able to understand what is the meaning and purpose of the Constitution we are studying, and what current of thought it was which became the foundation of that Constitution.

II. Fundamental ideals in the "Opening" (Preamble).

What are the fundamentals contained in the Preamble to the Constitution?

1. The State — so the text runs — is what "shall protect the whole of the Indonesian People and their entire native land of Indonesia . . . based upon . . . unity . . . mean while creating a condition of social justice for the whole of the People of Indonesia".
2. In this Preamble, the current of thought is accepted of the unitary state, the state which protects and covers the whole of the people. Thus the state encompasses every kind of group opinion, encompasses all opinions of individuals. The state, in accordance with the concept of this Preamble, seeks unity, and extends over the whole of the Indonesian People. This is one foundation of the state which may not be forgotten.
3. The third fundamental contained in the Preamble is that of sovereignty of the people, based upon democracy and deliberation amongst representatives. There fore, the system of state which is given form in the Constitution must be based upon sovereignty of the people and must be based upon deliberation amongst representatives. Indeed, this current of thought accords with the character of Indonesian society.
4. The fourth fundamental idea contained in the Preamble is that the state is based upon that Belief in the One, Supreme God which conforms with the principles of just and civilised humanity

Therefore, the Constitution must oblige the Government and other authorities of the state to nurture the nobility of human character and to hold fast to the fine moral ideals of the people.

III. The Constitution gives form in its articles to the fundamental ideas contained in the Preamble.

The above fundamental ideas pervade the spiritual background of the Constitution of the State of Indonesia. These fundamental ideas give rise to those ideals of law (Rechtsidee) which dominate the Fundamental Law of the State, both writen law (the constitution) and unwritten law.

The Constitution gives form to these fundamental ideas in its articles.

IV. The Constitution is short and flexible in character.

The Constitution has only 37 articles. The other paragraphs contain only additional and transitional provisions. This draft is thus very brief when compared, for instance, with the constitution of the Philippines.

It is enough if the Constitution contains only fundamental rules, contains only broad lines of instruction to the Central Government and to other authorities of the State for conducting the life of the State and providing social well-being. Especially for a new state and a young state, it is better if that written Fundamental Law contains only basic rules, whilst the provisions implementing those basic rules are left to statutes which are more easily drawn up, altered and revoked.

This is the system of the Constitution.

We must always remember the dynamic of the life of Indonesian society and state. Indonesian society and state are growing, the era is changing, especially during this present period of physical and spiritual revolution.

Therefore, we must live dynamically, we must watch every kind of movement in the life of Indonesian society and state. In that connection, let us not precipitately crystallize, provide form to (Gestaltung), ideas which can still easily alter.

Certainly, it is the nature of those written rules to be binding. For that reason, the more flexible ("elastic") those rules are, the better. Thus we must guard against the constitutional system being left behind the times. Let us not go so far as to make a constitution which is quickly out-moded (verouderd) What is extremely important in the administration and in the life of the state is the spirit, the spirit of the authorities of the state, the spirit of the leaders of the administration. Although a constitution is drawn up which, according to the letter, is characterised by the family principle, if the sprit of the authorities of the state, the leaders of the administration, be individualistic, that constitution is certain to have no meaning in practice. On the other hand, although that constitution is not perfect, if the spirit of the authorities of the administration is good, that constitution will certainly nol obstruct the course of the state. Thus what is most important is the spirit. That spirit is a living thing, or, in other words, it is dynamic. In connection with this, only the fundamental rules alone must be laid down in the constitution, whilst what is necessary for executing those fundamental rules must be 'left to statutes.

5. THE SYSTEM OF GOVERNMENT OF THE STATE

The system of the government of the State which is stipulated in the Constitution is:

I. Indonesia is a State Based on Law ("Rechtstaat").

1. The State of Indonesia is based upon law (Rechtstaat), it is not based upon mere power (Machtstaat).

II. The System is Constitutional.

2. The government is based upon constitutionalism (Fundamental Law), not absolutism (authority without limits).

III. The Highest Authority of the State is in the Hands the Majelis Permusyawaratan Rakyat ("die gesamte Staatsgewalt liegt allein bei der Majelis ").

3. The sovereignty of the people is held by a body named the Majelis Permusyawaratan Rakyat as the embodiment of the whole of the People of Indonesia (Vertretungsorgan des Willens des Staatsvolkes) The Majelis determines the Constitution and determines the broad lines of the policy of the State. The Majelis appoints the Head of State (President) and the Vice Head of State (Vice-President).

It is this Majelis which holds the highest authority of the State, whilst the President must execute the policy of the State according to the broad lines which have been determined by the Majelis.

The President, who is appointed by the Majelis, is subordinate to and responsible to the Majelis. He is the "mandatary" of the Majelis , he is obliged to execute the decisions of the Majelis.

The President is not "neben" but is "untergeordnet" to the Majelis.

IV. The President is the Highest Executive of the Government of the State below the Majelis.

Below the Majelis Permusyawaratan Rakyat, the President is the Highest Executive of the government of the state.

In conducting the administration of the State, authority and responsibility are in the hands of the President (concentration of power and responsibility upon the President).

V. The President is Not Responsible to the Dewan Perwakilan Rakyat.

Beside the President there is the Dewan Perwakilan Rakyat. The President must obtain the agreement of the Dewan Perwakilan Rakyat in order to make laws (Gesetz gebung) and in order to fix the estimates of the revenues and expenditures of the State (Staatsbegroting).

Because of this, the President must work together with the Dewan Perwakilan Rakyat, but the President is not responsible to the Dewan, which means that the President's position is not dependent upon the Dewan.

VI. The Ministers of the State are Assistants to the President: the Ministers of the State are Not responsible to the Dewan Perwakilan Rakyat.

The President appoints and dismisses the Ministers of the State. Those Ministers are not responsible to the Dewan Perwakilan Rakyat. Their positions are not dependent upon the Dewan but are dependent upon the President. They are the assistants of the President.

VII. The Authority of the Head of State is Not Unlimited

Although the Head of State is not responsible to the Dewan Perwakilan Rakyat, he is not a "dictator", which means that his authority is not unlimited.

It has been stressed above that he is responsible to the Majelis Permusyawaratan Rakyat. Apart from this, he must carefully and thoroughly pay attention to the voice of the Dewan Perwakilan Rakyat.

The Position of the Dewan Perwakilan Rakyat.

The position of the Dewan Perwakilan Rakyat is strong. The Dewan can not be dissolved by the President. (This is at variance with the parliamentary system). Apart from this, the members of the Dewan are all of them concurrently members of the Majelis Permusyawaratan Rakyat For that reason the Dewan Perwakilan Rakyat can at all times control the acts of the President, and if the Dewan considers that the President has in fact transgressed against the policy of the State determined by the Constitution or by the Majelis Permusyawaratan Rakyat. the Majelis can be called for a special sitting so that it can ask the President to account for his responsibility.

The Ministers of the State are Not Ordinary High-Ranking Civil Servants.

Although the positions of the Ministers of the State are dependent upon the President, nevertheless they are not ordinary high-ranking civil servants, because it is those Ministers who, in the first place, in practice execute the authority of the Government (pouvoir executif).

As the leaders of Departments, the Ministers know the ins and outs of matters connected with their jurisdictions. In connection with this, Ministers have great influence upon the President in determining that part of the state's policy with which their Departments are concerned. Indeed, what is intended is that the Ministers are Leaders of the State.

In determining Government policy and in co-ordinating the administration of the State, the Ministers work together as closely as possible, one with the other, under the leadership of the President.

CONCERNING THE ARTICLES

Chapter 1. The Form and Sovereignty of the State

Article 1

This prescribes that the form of the state shall be unitary

and a Republic, and contains the fundamental idea of sovereignty of the People.

The Majelis Permusyawaratan Rakyat is the highest organ of the State. This Majelis is considered to be the embodiment of People which holds the sovereignty of the State.

Chapter II. The Majelis Permusyawaratan Rakyat

Article 2

Clause 1.

The intention is that the whole of the people, all the groups and all the regional territories throughout the country, shall have representatives in the Majelis, so that the Majelis can truly be considered to be the embodiment of the People.

What are referped to as "groups" are Bodies such as co-operatives, workers associations and other collective bodies. A rule such as this is indeed in harmony with the trend of the times. In connection with the recommendation to establish the co-operative system in the economy, this clause recalls the existence of groups in economic organisations.

Clause 2.

This organ which will have a large total membership, sits at least once in five years. At least once, therefore if necessary of course it may sit more than once in five years by holding special sesions.

Article 3

Because the Majelis Permusyawaratan Rakyat holds the sovereignty of the State, its powers are not limited: in view of the dynamic of society, once in five years the Majelis reviews everything which has happened and considers all the trends at that time, and determines what policies it desires to be used for the future.

Chapter III. The Powers of Government of the State.

Article 4 and Article 5, clause 2.

The President is the head of the executive power in the State. In order to execute laws, he possesses the power to prescribe government regulations (ponvoir reglementair).

Article 5, clause 1.

Apart from the executive power, the President together with the Dewan Perwakilan Rakyat execises the legislative power in the State.

Article 6, 7, 8, 9.

Already clear.

Articles 10, 11, 12, 13, 14, 15.

The powers of the President provided by these articles are consequences of the President's position as Head of State.

Chapter IV. The Supreme Advisory Council.

Article 16

This Council is a Council of State which is obliged to provide considered views to the Government. It is purely an advisory body.

Chapter V. The Ministers of the State.

Article 17

See above

Chapter VI. Local Government.

Article 18.

I. Because the State of Indonesia is a unitary state, Indonesia, therefore, will not have within its jurisdiction areas which have the character of "states".

The area of Indonesia will be divided into provinces, and these provinces will likewise be divided into smaller regional territories. These regional territories will have an autonomous character (streek and locale rechtsgemeenschappen), titles of so-called autonomous areas during the colonial period, or have the character of purely administrative regions, all to be in accord with rules to be laid down by statute.

In those regional territories with an autonomous character, local representative bodies will be set up, because local government also will be founded upon the principle of deliberation.

II. Within the territory of the State of Indonesia there are to be found about 250 Zelfbesturende landschappen, and Volks gemeenschappen, titles of so-called self-governing localities during the colonial period, such as the desa of Java and Bali, the nagari of Minangkabau, the dusun and marga: names of various social-administrative units.

Those localities have their own traditional structures, and for this reason can be considered to have a special character.

The State of the Republic of Indonesia respects the position of the said special regional territories, and all its regulations affecting those areas will bear in mind their traditional rights.

Chapter VII. The Dewan Perwakilan Rakyat
Articles 19, 20. 21 and 23.

See above

The Dewan Perwakilan Rakyat must give its agreement to each and every draft law originating with the Government. The Dewan Perwakilan Rakyat also possesses the right to initiate legislation.

III. The Dewan also possesses the hak begroting (right to fix the budget article 23). Through this right, the Dewan controls the Government.

It must also be recalled that all members of the Dewan Perwakilan Rakyat are concurrently members of the Majelis Permusyawaratan Rakyat.

Article 22

This article concerns the noodverordeningsrecht (right to make emergency regulations) of the President. Such a provision is indeed necessary, so that the safety of the State can be ensured by the Government in critical conditions which compel the Government to the quick and appropriate action. Although this is so, the Government is not, however, to be released from the control of the Dewan Perwakilan Rakyat. Therefore, the Government Regulations referred to in this article, which have the same force as laws, have also to be ratified by the Dewan Perwakilan Rakyat.

Chapter VIII. Finance.
Article 23, clauses 1, 2, 3, 4

Clause 1 lays down the budget-making right of the Dewan Perwakilan Rakyat.

The method of fixing the estimates of revenues and expenditures is a criterion of the character of the government of a state. In countries based upon fascism, those estimates are fixed solely by the administration. But in democratic states or states based upon sovereignty of the people, such as the Republic of Indonesia, the estimates of revenues and expenditures are fixed by statute, which means: with the agreement of the Dewan Perwakilan Rakyat.

How the People — as a nation — shall live, and from where the expenses for living shall be obtained, must be determined by the People themselves through the intermediary of their representative body. The People determine their own fate and therefore their way of life also.

Article 23 states that in fixing revenues and expenditures, the position of the Dewan Perwakilan Rakyat is stronger than

the position of the Government. This is a sign of the sovereignty of the People.

Because the fixing of expenditures concerns the right of the People to determine their own fate, all measures placing burdens upon the people, such as taxes etc, must be prescribed by statute, that is, with the agreement of the Dewan Perwakilan Rakyat.

Also the kinds and values of currency are prescribed by statute. This is important because the position of the currency has great influence upon the community. Money in the first place is an instrument of exchange and of measurement of value. As an instrument of exchange its purpose is to facilitate exchange – buying and selling – in society. It follows from this that it is necessary that there be those kinds and forms of money needed by the people as measures of value as a basis for fixing the worth of the respective goods which are exchanged. The thing which becomes the measure of value must have fixed worth, it must, not be allowed to rise and fall because of the unregulated condition of the money. Therefore, the state of the currency must be prescribed by statute.

Related to this, the position of Bank Indonesia, which is to issue and to regulate the circulation of paper money is prescribed by statute.

Clause 5.

The way in which the Government makes use of the allocations already agreed by the Dewan Perwakilan Rakyat must be in keeping with that decision. In order to investigate the Government's reponsibilities in this respect, a body is needed which is free from the Government's influence and authority. A body which is subordinate to the Government could not perform so heavy a duty. On the other hand, neither is that body one which stands above the Government.

Because of this, the powers and duties of that body are prescribed by statute.

Chapter IX. The Judicial Powers.

The judicial powers are powers which are independent, which means that they are free from the influence of the Government's authority. Therefore, guarantees must be established by statute concerning the position of judges.

Chapter X. Citizens

Article 26, clause 1

People of other nations, for instance, people of Dutch descent, of Chinese descent and of Arab descent, who are domiciled in Indonesia, who recognise Indonesia as their country and who are loyal to the State of the Republic of Indonesia, can become citizens.

Article 26, clause 2.

Already clear.

Articles 27, 30 and 31 clause 1

These articles concern the rights of citizens.

Articles 28, 29 clause 1, and 34.

These articles concern the position of the residents.

The articles referred to here, both those which concern citizens alone as well as those which concern all residents, contain the desire of the Indonesian people to build a state with a democratic character which seeks to put into practice social justice and the principle of humanity.

Chapter XI. Religion

Article 29, clause 1.

This clause states the belief of the Indonesian people in the One, Supreme God.